No. 84-405

Office-Supreme Court, U.S.
FILED
SEP 14 1984
ALEXANDER L. STEVAS,
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In the Supreme Court of the United States

OCTOBER TERM, 1983

JACK WALTERS & SONS CORPORATION,

Petitioner,

vs.

MORTON BUILDINGS, INC.,

Respondent.

APPENDIX

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APPENDIX

App. 1

Opinion by Judge Posner
Judge Swygert concurring
JUDGMENT – ORAL ARGUMENT

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
June 22, 1984.

Before
Hon. Jesse E. Eschbach, *Circuit Judge*
Hon. Richard A. Posner, *Circuit Judge*
Hon. Luther M. Swygert, *Senior Circuit Judge*

No. 83-2300

JACK WALTERS & SONS CORP.,

Plaintiff-Appellant,

vs.

MORTON BUILDING, INC.,

Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Wisconsin.
No. 78-C-329
Terence T. Evans, Judge.

This cause was heard on the record from the United States District Court for the Eastern District of Wisconsin, Division [sic], and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this Court filed this date.

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 83-2300

JACK WALTERS & SONS CORP.,

Plaintiff-Appellant,

v.

MORTON BUILDING, INC.,

Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Wisconsin.
No. 78 C 329—Terence T. Evans, *Judge.*

ARGUED MARCH 30, 1984—DECIDED JUNE 22, 1984

Before ESCHBACH and POSNER, *Circuit Judges*, and SWYGERT, *Senior Circuit Judge.*

POSNER, *Circuit Judge.* This antitrust suit under section 1 of the Sherman Act, 15 U.S.C. § 1, pits a building-materials dealer, Walters, against a manufacturer of prefabricated farm buildings, Morton. The complaint, filed in 1978, alleges that Morton tied building components to its trademark, assigned its franchised dealers (one of whom was Walters) exclusive sales territories, limited the prices the dealers could charge consumers, and eventually took over the dealership function, terminating Walters in the process. There also is a pendent claim for breach of a duty of fair dealing under Wisconsin law. In 1981, shortly before trial was to begin, Morton moved for sum-

mary judgment. The district judge referred the motion to a special master, a member of the Milwaukee bar. After considering for 17 months the voluminous materials that the parties had submitted in connection with the motion, the special master submitted his report, which recommended granting the motion except with respect to the claim regarding exclusive territories. In a brief order the district judge adopted the master's recommendations in their entirety and therefore dismissed all but the exclusive-territories claim, which he retained for trial. He then directed entry of final judgment for Morton on the dismissed claims upon an express determination that there was no just reason for delay, and Walters has appealed under Rule 54(b) of the Federal Rules of Civil Procedure.

We consider first, on our own initiative as we must, whether the dismissed and retained claims are separate claims within the meaning of Rule 54(b); if they are not, the judgment of dismissal cannot be appealed as a final judgment and Walters must wait to take its appeal until the exclusive-territories claim is tried. Our recent decisions emphasize that trial judges do not have carte blanche to certify partial dispositions for immediate appeal under Rule 54(b). See *A/S Apothekernes Laboratorium v. I.M.C. Chem. Group, Inc.*, 725 F.2d 1140 (7th Cir. 1984); *Minority Police Officers Ass'n v. City of South Bend*, 721 F.2d 197 (7th Cir. 1983). The rule itself makes clear that a district judge may enter an appealable judgment only if it disposes of a "claim for relief" that is "separate" from the claims not disposed of. But unfortunately the meaning that the draftsmen intended "claim for relief" to bear is not clear, see *Local P-171, Amalgamated Meat Cutters v. Thompson Farms Co.*, 642 F.2d 1065, 1069-71 (7th Cir. 1981); 10 Wright, Miller & Kane, Federal Practice and Procedure § 2657 (2d ed. 1983), and the Supreme Court has not yet attempted a compendious definition. See *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427 (1956); *Cold Metal Process Co. v. United Engineering & Foundry Co.*, 351 U.S. 445 (1956); *Liberty Mutual Ins. Co. v. Wetzel*, 424 U.S. 737, 743 n. 4 (1976). The re-

cent decisions of this court have experimented with a practical approach based on what we conceive to be the most important purpose behind Rule 54(b)'s limitations—to spare the court of appeals from having to keep relearning the facts of a case on successive appeals. The approach is: if the facts underlying different claims are different, the claims are separate for Rule 54(b) purposes. For if there are different facts (and of course different issues) consideration of the appeals piecemeal rather than all at once will not involve a duplication in the efforts required of the judges to prepare for argument in, and to decide, each appeal. The gains from forcing the consolidation of appeals will therefore be small and will be outweighed by the benefits of an immediate appeal in resolving the parties' rights with respect to a part of the controversy between them. By the same token, if there is a great deal of factual overlap between the decided and the retained claims they are not separate, and appeal must be deferred till the latter are resolved.

Applying this approach to the present case, we find potential but not actual factual overlap between the charges that the district judge dismissed and the single charge, involving exclusive territories, that he retained; therefore we have jurisdiction of the appeal. A charge that limiting the territories in which one's dealers can sell violates section 1 of the Sherman Act is now evaluated under the Rule of Reason. See *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977). This means among other things that the plaintiff must show that the defendant has market power, see *Valley Liquors, Inc. v. Renfield Importers, Ltd.*, 678 F.2d 742, 745 (7th Cir. 1982), as this is a prerequisite to being able to restrain trade unreasonably. The Supreme Court's most recent tying decision requires the plaintiff to make a similar, maybe identical, showing in order to prove that a tying arrangement is unlawful, even though tying still is referred to as a per se offense. See *Jefferson Parish Hospital Dist. No. 2 v. Hyde*, 104 S. Ct. 1551, 1559-60 (1984). Moreover, where as in the present case the

plaintiff tries to show that the whole is greater than the sum of its parts—that an "aggregation of trade restraints" is unlawful even if the constituent restraints taken one by one are not—and one of the parts is territorial exclusivity, the issue of unlawful "aggregation" logically requires consideration of the facts concerning territorial exclusivity.

All these are reasons why in the usual case a challenge to a scheme of restricted distribution states only one claim for Rule 54(b) purposes. But this case is unusual in that the particular grounds on which the special master and the district judge disposed of the charges that are involved in the appeal do not overlap, factually or legally, the charge of territorial exclusivity that he retained for trial. A clue to this is that the parties' briefs in this court tell us nothing about the exclusive territories—how large they were, how exclusivity was enforced, how long exclusive territories were in effect, and for what reasons and with what consequences. Although the voluminous record submitted with the appeal contains much on these questions, that is only because the appeal record is the same record that was before the master and the district judge. The parties have made no reference to the parts of the record that relate to exclusive territories. The district judge dismissed the tying charge not because he found that Morton lacked market power, an issue that as we have said would also be highly relevant to the lawfulness of territorial restrictions, but because he found that the tying and the tied products were not separate products and therefore that there could be no tie-in. He dismissed the resale price maintenance and vertical integration allegations (the latter involving Morton's takeover of the retail distribution of its buildings) on evidentiary grounds unrelated to the lawfulness of exclusive territories. And with all of the specific charges other than the territorial charge dismissed, the "aggregation of trade restraints" charge fell of its own weight, like a conspiracy charge when all but one of the alleged participants have been exonerated.

Since, for these reasons, this appeal is unencumbered by any facts bearing on the retained claim, we are entitled to regard that as a separate claim. Its retention by the district court therefore does not deprive us of jurisdiction over the appeal from the dismissal of the rest of the plaintiff's case. This brings us to the merits. We begin with the tie-in charge.

Almost every product can be viewed as a package of component products: a pair of shoes, for example, as a package consisting of a left shoe and a right shoe; a man's three-piece suit as a package consisting of a jacket, vest, and pants; a belt as a package consisting of a buckle and a strap. As shown by the last of these examples, it is possible to describe a product as a package of components even if the components are physically integrated at the point of sale to the consumer. Indeed, much of what is called "manufacturing" is the assembly, i.e., physical integration, of components, often components manufactured by other companies. The manufacturer of an airplane, for example, does not build the whole thing from scratch. Usually he will build just the airframe, consisting of the fuselage, wings, and tail, and he will buy the engine, the wheels, the radar and other electronic equipment and much else besides from other manufacturers and will then assemble the various components to create the finished aircraft. Very few products today are produced like a statue that is made by pouring molten bronze into a cast—the ultimate single product. But to hold therefore that every composite product is a tie-in, subject to the hostile scrutiny to which antitrust law still subjects tie-ins, would place industry under a vast antitrust cloud, and has been rejected. In *Johnson v. Nationwide Industries, Inc.*, 715 F.2d 1233 (7th Cir. 1983), for example, we held that a condominium and a contract for the provision of management services to the condominium owner were a single product, so that the owner could not complain, at least under antitrust law, that the developer who had sold him the condominium had forced him as a condition of being allowed to purchase it to agree to buy the de-

veloper's management services as well. See also *Foster v. Maryland State Savings & Loan Ass'n*, 590 F.2d 928, 932-33 (D.C. Cir. 1978).

The problem is that there is no obvious way of deciding whether a product is a single product or an assemblage of components. The practice has been to classify a product as a single product if there are rather obvious economies of joint provision, as in the left-shoe-right-shoe example. See *Principe v. McDonald's Corp.*, 631 F.2d 303, 309-11 (4th Cir. 1980); Sullivan, Handbook of the Law of Antitrust 449 (1977); Comment, *A New Approach to the Legality of Franchising Tie-Ins*, 129 U. Pa. L. Rev. 1267, 1293 (1981). Although this approach seems to take what would otherwise be a matter of defense and make its absence a threshold requirement of the offense, it does serve to screen out many silly cases. A different but related approach was taken recently in the *Jefferson Parish* case (decided after argument in our case), where the Supreme Court held that products are separate for tie-in purposes if there are separate markets for each product. See 104 S. Ct. at 1562-63. The link to the older view is that if there are not separate markets, this is evidence that the economies of joint provision are overwhelming.

The test of *Jefferson Parish* disposes handily of the shoe example, but could be thought to place decisions such as *Johnson* under a cloud, since there are separate markets for condominiums and for real estate management services. Only time will tell how far the "separate markets" approach of *Jefferson Parish* will be pushed. There are separate markets for sugar and for sugarless breakfast cereals, but it would be surprising to find that a sugary cereal was a tie-in (sugar tied to cereal), assuming the seller refused to sell a sugar-free version. The belt example also becomes problematic under the separate-markets approach. Belts are rarely sold without buckles; but surgical operations are even more rarely sold without anesthesia (held in *Jefferson Parish* to have been tied to the hospital's operating rooms). There may be overwhelm-

ing economies of joint provision for most customers and yet enough customers with idiosyncratic demands to encourage small markets tailored to their needs to emerge, as has happened with ornamental belt buckles. The separate market for ornamental buckles resembles the separate market for anesthesia, which exists because a patient can contract separately with the surgeon and with the anesthesiologist. We doubt that, even after *Jefferson Parish*, belts are tie-ins of buckles to straps; yet we cannot be sure where the separate-markets test will lead.

Still, we are reasonably confident that under that test as under the older, more intuitive test a building is a single product and not a tie-in of the walls, floors, roof, windows, and so forth; for most of these components are not sold in separate markets, though some are. And as Walters' counsel acknowledged helpfully at argument, it does not matter whether, as with hobby kits of various sorts (and even motorcycles, see *Flaminio v. Honda Motor Co.*, No. 83-2164, slip op. at 1-2 (7th Cir. May 2, 1984)), the manufacturer, instead of assembling the components himself at the factory, ships the unassembled components and the actual assembly is done by the customer or by a dealer (as was the case here, before Morton took over the dealer function). It is enough if the end product is a single product; and a single building is a single product.

All this is more or less common ground among the parties and we have gone over it at such length only to dispel any impression that a tie-in case about prefabricated buildings must be based on a claim that the prefabricated parts were tied to each other. That is not Walters' claim. Its claim is that the Morton name, the Morton trademark, is the tying product and the building, the kit of prefabricated building components, is the tied product. The difficulty with this argument is that a product and its name are inseparable. It is one thing to say that a manufacturer of copying machines who requires his customers to buy from him the copying paper that is used in the machines is conditioning the sale of the machines on the customer's purchase of a distinct product; it is quite

another to say that General Motors lets you use the name Buick on condition that you buy the car to which the name is attached. That is a fantastical description of the transaction, and the cases reject the proposition that a tie-in claim can be based on it. See, e.g., *California Glazed Products, Inc. v. Burns & Russell Co.*, 708 F.2d 1423, 1430 (9th Cir. 1983); *Dart Industries, Inc. v. Plunkett Co.*, 704 F.2d 496, 500 (10th Cir. 1983); *Hamro v. Shell Oil Co.*, 674 F.2d 784, 788 (9th Cir. 1982); *Krehl v. Baskin-Robbins Ice Cream Co.*, 664 F.2d 1348, 1352-54 (9th Cir. 1982); *Redd v. Shell Oil Co.*, 524 F.2d 1054, 1056-57 (10th Cir. 1975); *Kugler v. AAMCO Automatic Transmissions, Inc.*, 460 F.2d 1214 (8th Cir. 1972). The only appellate case we can find in which such a claim was accepted is *Warriner Hermetics, Inc. v. Copeland Refrigeration Corp.*, 463 F.2d 1002, 1015-16 (5th Cir. 1972). To accept it would be to impose in the name of antitrust a regime of compulsory licensing of trademarks—an absurd project. Moreover, since a trademark that denotes a product is rarely licensed apart from the product—and was not in this case—the separate-markets test of *Jefferson Parish* is not satisfied.

However, some cases, including several in this circuit, do treat as tying products trademarks that name not a product manufactured by the trademark's owner but a service which he provides to consumers through a system of franchised retail outlets; the tie-in consists of requiring franchisees, as a condition of being allowed to use the trademark, to buy distinct products supplied by the franchisor. See, e.g., *Photovest Corp. v. Fotomat Corp.*, 606 F.2d 704, 722 (7th Cir. 1979); *Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc.*, 585 F.2d 821, 834 (7th Cir. 1978); *Milsen Co. v. Southland Corp.*, 454 F.2d 363, 365 (7th Cir. 1971); *Siegel v. Chicken Delight, Inc.*, 448 F.2d 43 (9th Cir. 1971); *Susser v. Carvel Corp.*, 332 F.2d 505 (2d Cir. 1964), cert. dismissed, 381 U.S. 125 (1965). The trademark is analytically separable from the tied product, so there is not the same absurdity in treating the trademark as a tying product as there is when the trademark is simply the name of the alleged tied product, as in our

example of the Buick name and the Buick automobile. "Chicken Delight," in contrast, was the name of a fast-food franchise operation, not the name of a product; and the franchisor, the owner of the "Chicken Delight" mark, manufactured none of the things (which included mixes, fryers, and packaging supplies) that it required its franchisees to buy from it as a condition of their being allowed to use the name. *Siegel v. Chicken Delight, Inc.*, *supra*, 448 F.2d at 48 n. 4. It was a "case of a franchise system set up not to distribute the trade-marked goods of the franchisor, but . . . to conduct a certain business under a common trade-mark or trade name." *Id.* at 48 (footnote omitted). The name and the tied products thus were separable in a way that the name Buick and the car sold under that name are not. Or so at least it can be argued; for the *Chicken Delight* line of cases is not universally delectated. See, e.g., *Principe v. McDonald's Corp.*, *supra*, 631 F.2d at 309; Baker, *The Supreme Court and the Per Se Tying Rule: Cutting the Gordian Knot*, 66 Va. L. Rev. 1235, 1315-17 (1980). And the emphasis in the Supreme Court's recent decision in *Jefferson Parish* on the importance of proving that the owner of the tying product has real market power may doom the franchise trademark cases, as they mostly involve highly competitive retail industries, such as the fast-food business. But we shall not have to get into the broader questions here. All we shall have to decide is whether Morton Building, the name the defendant has given to its prefabricated farm buildings, is more like Chicken Delight or more like Buick—bearing in mind that since this question was decided on summary judgment we cannot answer it in Morton's favor if there is any material fact in dispute.

Morton manufactures some building parts, such as sheet-metal walls and wooden corner posts, buys others from other manufacturers, and ships the unassembled parts to retail outlets for assembly into finished buildings on the farmer's property. The parts when assembled make a rather austere building, even for a farm utility building, and often the dealer will customize the building by add-

ing things that are not part of Morton's kit. A Morton Building is therefore quite likely to contain some parts not supplied by Morton, just as an automobile might have some accessories that had not been supplied by the manufacturer, such as a dealer-supplied car alarm. But whether few or many farmers embellish their Morton Buildings, the inference that Morton really is engaged in manufacturing buildings is inescapable, and we think this fact defeats any effort to separate its name from the product that it is alleged to be tying to it. Maybe Walters is capable, as it alleges, of building from parts it gets elsewhere a farm building identical to the Morton Building; but it does not follow that it can put Morton's name on it, when Morton wants to manufacture the Morton Building itself. If Morton were just selling blueprints for a building and it told the people it sold them to, "You must buy your bathroom faucets from us if you want to use the blueprints," then it might be possible to separate design and product. But if you happen to be in the business of selling faucets, a dealer cannot force you to let him sell, under your name, faucets he gets elsewhere.

To summarize, we hold that there was no tie-in because there were no separate products (or services) tied together. But we emphasize again that it is not alleged that Morton tied accessories to the building kits that it sold, so we need not decide at what point prefabricated building parts cease to be a single product.

The next question is whether Morton violated the per se rule against resale price maintenance. Several times each year Morton would advertise special deals for its buildings. The advertising was directed to the consuming public and mentioned special prices at which consumers could buy the buildings from dealers such as Walters, listing them by name. Morton gave dealers a discount from the wholesale price to make it easier for the dealers to offer consumers the special retail price that Morton had advertised. It was important to Morton that dealers not charge a higher price than the advertised price, because if they did Morton's advertising would lack

credibility—indeed, would be deceptive and create ill will. So, according to Walters' affidavits, Morton took various steps to see that its dealers sold its buildings at no more than the advertised price. These steps included threatening the dealers with termination if they went above that price, offering if they did to sell directly to the public at the advertised price, and checking up on the dealers to see whether they were charging more. Walters also charges that Morton made it hard for the dealers to comply with its desire that they sell at the advertised price by giving them a smaller discount from the wholesale price than the difference between the regular retail price and the advertised price.

The usual form of resale price maintenance, the form that invited condemnation from the Supreme Court in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911), involves setting a minimum price below which dealers may not sell rather than a maximum price above which they may not sell. It is minimum price fixing that creates the analogy to a dealers' cartel upon which the per se rule against resale price maintenance rests. Although *Albrecht v. Herald Co.*, 390 U.S. 145 (1968), extended the rule of *Dr. Miles* to a scheme of maximum resale price maintenance, the continued vitality of *Albrecht* is in doubt after *Continental T.V., Inc. v. GTE Sylvania Inc.*, *supra*, held that assigning dealers exclusive territories is not unlawful per se. The newspaper dealers in *Albrecht* had exclusive territories, and putting a ceiling on their prices was, as Justice Stewart pointed out in his dissenting opinion, a way for the Herald Company to prevent the dealers from exploiting the monopoly power that territorial exclusivity gave them. See 390 U.S. at 169. But at a time when exclusive territories, at least if imposed through a sale contract (as in *Albrecht*) rather than an agency contract, were illegal per se, as had been held a year before *Albrecht* in *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967) (the decision overruled by *Sylvania*), it was not a good defense of maximum price fixing that it was ancillary to

a system of exclusive territories. Now that assigning exclusive territories to dealers is lawful if reasonable, a manufacturer-imposed price ceiling intended to limit the power that exclusive territories give dealers to raise prices regardless of what other dealers in the manufacturer's product are charging may also be lawful in some cases—a proposition suggested by Professor Pitofsky in *The Sylvania Case: Antitrust Analysis of Non-Price Vertical Restrictions*, 78 Colum. L. Rev. 1, 16 n. 59 (1978), and supported by the First Circuit's decision in *Eastern Scientific Co. v. Wild Heerbrugg Instruments, Inc.*, 572 F.2d 883, 885-86 (1st Cir. 1978). The defendant in that case had a lawful system of exclusive territories but allowed its dealers to sell outside their territories provided they did not sell below a certain price. This provision was held lawful because it allowed a little more competition than if the territories had been airtight. The justification for maximum prices within exclusive dealer territories is even more straightforward: it forces price within the territories closer to the competitive level. See Easterbrook, *Maximum Price Fixing*, 48 U. Chi. L. Rev. 886, 890 n. 20 (1981). It is true that, after *Sylvania* was decided, *Albrecht* was cited approvingly in *Arizona v. Maricopa County Medical Soc'y*, 457 U.S. 332, 347-48 (1982) (4-3 decision), but only as supporting the proposition that horizontal price fixing is not saved from condemnation merely because the prices fixed are maximum rather than minimum prices, see *id.* at 348 and n. 18, a matter of no significance here. Indeed, the footnote can be read as supporting a distinction between horizontal and vertical maximum price fixing.

But we need not explore this maze further. Since the lawfulness of Morton's territorial exclusivity has not been adjudicated, it is premature to conclude that maximum price fixing would be a lawful incident to it. We mention the point to avoid creating the impression that we consider maximum price fixing always and everywhere unlawful (unless horizontal, in which event it is indeed illegal per se, as held in *Maricopa*, 457 U.S. at 348). That seems to us an open question after *Sylvania*. But even if we assume that maximum price fixing would be un-

lawful in this case, as it might well be if Morton's exclusive territories were unlawful (an issue not before us on this appeal), we must still determine whether the conduct attested to in Walters' affidavits is price fixing. The special master thought that Morton's efforts to compel its dealers to comply with the advertised price, and the dealers' responses, did not create an agreement to adhere to that price; and without agreement there can be no violation of section 1 of the Sherman Act. The picture painted by Walters' affidavits is one not of agreement but of Morton's unsuccessful efforts to force Walters to agree. However, Supreme Court pronouncements which appear still to be authoritative despite the considerable changes in the Court's interpretation of the antitrust laws in recent years indicate that when a seller goes beyond announcing a policy of refusing to deal with price cutters (or in this case price gougers) and of cutting off those dealers who do not comply with the announced policy, it has, for section 1 purposes, conspired with any dealer who complies with the policy. See, e.g., *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960). Here some dealers did comply; and Walters' affidavits if true indicate that Morton went beyond simply announcing its policy and terminating noncompliers, and used persuasion and policing to obtain that compliance, as in *Yentsch v. Texaco, Inc.*, 630 F.2d 46, 49-55 (2d Cir. 1980). See also *Monsanto Co. v. Spray-Rite Service Corp.*, 104 S. Ct. 1464, 1471-73 (1984).

But there is a more fundamental ground, alluded to by the special master, which requires that we uphold the dismissal of this part of the complaint. Walters concedes as it must that it is perfectly lawful for a manufacturer to advertise his product to the ultimate consumer, whether or not he sells directly to the consumer, and to mention in that advertising the retail price of the product—the only price the consumer is interested in. The law of products liability has come to recognize what economists and businessmen have long known—that manufacturers are in a direct economic relationship with the ultimate consumers of their products even if they are not

in privity with them. See, e.g., *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 412-16, 161 A.2d 69, 99-101 (1960). This insight cannot be limited to tort law. The demand for a manufacturer's product depends significantly on the retail price; the lower that price is (other things being equal), the more his product will be demanded by consumers and therefore by the dealers who are his immediate purchasers. Hence the manufacturer has a vital interest in the retail price. Maybe that interest is not great enough to allow him to place a cap on the retail price but Walters concedes that it is great enough to allow the manufacturer to advertise a retail price.

This concession is very damaging to Walters. If it is lawful to advertise a retail price, it should be lawful to take at least the minimum steps necessary to make that advertising beneficial. It would be pretty embarrassing for a manufacturer who had advertised a special retail price to be bombarded by complaints from consumers that dealers were refusing to sell to them at that price. Such refusals would make the advertising misleading and might even expose the manufacturer to legal sanctions under the Federal Trade Commission Act or counterpart state regulations. So if retail price advertising by manufacturers is to be feasible the manufacturer must be allowed to take reasonable measures to make sure the advertised price is not exceeded. These measures include trying to persuade dealers to adhere to the advertised price and checking around to make sure they are adhering. These are the respects in which Morton is alleged to have gone beyond the simple announcement of policy and refusal to deal with noncompliers that would be permissible even if it were trying to get its dealers to adhere to its suggested retail prices across the board. See *Monsanto Co. v. Spray-Rite Service Corp.*, *supra*, 104 S. Ct. at 1469. They are the minimum steps that Morton had to take if its advertised price was to have any value at all, and they are therefore lawful. Cf. *Bruce Drug, Inc. v. Hollister, Inc.*, 688 F.2d 853, 859-60 (1st Cir. 1982).

It is true that dicta in *Butera v. Sun Oil Co.*, 496 F.2d 434, 437 (1st Cir. 1974), based on *Pearl Brewing Co. v.*

Anheuser-Busch, Inc., 339 F. Supp. 945 (S.D. Tex. 1972), suggest that for a supplier to condition a cut in the wholesale price to his dealers on their agreeing to pass it on to the consumer by lowering their prices, which is a little like what is alleged here, is a form of price fixing. But the more recent decisions hold to the contrary. See *Lewis Service Center, Inc. v. Mack Trucks, Inc.*, 714 F.2d 842, 846 (8th Cir. 1983); *AAA Liquors, Inc. v. Joseph E. Seagram & Sons, Inc.*, 705 F.2d 1203, 1206 (10th Cir. 1982). And in none of these cases did the manufacturer have the additional argument that Morton has here: Morton had to pressure its dealers to lower price in order to maintain the credibility of its price advertising—a form, by the way, of constitutionally protected speech. See *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976).

All this is not to say that simply by advertising retail prices a manufacturer gets the right to fix retail prices. If Morton had tried to fix its dealers' prices at times when it was not advertising special deals at specific prices, its efforts would not be privileged just because at other times it did advertise retail prices. Nor could Morton require its dealers to comply with minimum prices. And therefore it could not forbid them to sell at less than the advertised prices. See *Lehrman v. Gulf Oil Corp.*, 464 F.2d 26, 39-40 (5th Cir. 1972). But it did not do any of these things.

Even if what Morton did was price fixing, Walters could not challenge it. A private plaintiff can complain only of an antitrust injury. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977). It is not enough that the plaintiff would not have been injured but for the defendant's alleged violation of the antitrust laws; the injury must be the sort of thing that the antitrust laws are intended to forbid. The plaintiff in *Brunswick* was complaining that the defendant's acquisition of a rival would enable the rival to become a more efficient company, and therefore a more effective competitor of the plaintiff. The Supreme Court held that the plaintiff could

not complain about the injury. It would have been different if the complaint was that the acquisition would lead to the rival's engaging in predatory pricing or some other method of competition with the plaintiff that the antitrust laws are intended to prevent.

There is nothing esoteric about the *Brunswick* rule. It is the application to antitrust law of venerable principles of tort causation illustrated by *Gorris v. Scott*, 9 L.R. Ex.-125 (1874). The plaintiff's animals, which were being transported on the deck of the defendant's ship, were washed overboard in a storm. They would have been saved if the deck had been penned, as required by statute. But since the purpose of the statute was to prevent contagion, not drowning, the defendant was not liable. Similarly, although the plaintiff in *Brunswick* would not have been hurt if there had been no acquisition, the acquisition did not hurt it in the way that the framers of the antitrust laws had in mind. In the present case, even if Morton did violate the prohibition against fixing its dealers' prices, the only harm to Walters came from the fact that competing dealers (or Morton itself) would lower their prices to consumers if Walters did not. There is no suggestion that the lower prices would have been below cost; they would have been lawful prices. This case thus is stronger for the defendant than *Gorris*. The loss of the animals was a pure social cost, while the loss to Walters from lawful price competition was a gain to consumers. Walters will not be heard to complain about having to meet lawful price competition, which antitrust law seeks to encourage, merely because the competition may have been enabled by an antitrust violation. See *MCI Communications Corp. v. American Tel. & Tel. Co.*, 708 F.2d 1081, 1161 (7th Cir. 1983); Page, *Antitrust Damages and Economic Efficiency: An Approach to Antitrust Injury*, 47 U. Chi. L. Rev. 467, 491 (1980).

The remaining antitrust claim that the district court dismissed is that the tie-in, resale price maintenance, and exclusive-territories allegations, taken together, make out an independent violation of section 1 of the Sherman Act,

because they establish a scheme to destroy Morton's independent dealers in order that Morton could take over the retail sale of its buildings, as eventually it did. Our conclusion that there was no tie-in and no resale price maintenance may seem to eliminate all possibility that there was an unlawful scheme of greater compass than the territorial exclusivity, which is not before us on this appeal. But it is possible to recast Walters' argument as follows. Even if there was no tie-in in a technical sense and no resale price maintenance in the sense in which it is a per se violation of section 1, still when one combines what Morton is alleged to have done (such as forbidding its dealers to obtain, from other manufacturers, any Morton Building components that Morton supplies, and squeezing the dealers by forcing them to sell buildings at the low prices that Morton advertised and to swallow part of the discount) with its alleged motive in doing so of driving the dealers out of business, an unreasonable restraint of trade can be inferred. And it meets the threshold requirement of section 1 that there be a contract, combination, or conspiracy, since Morton managed to draw some of its (doomed) dealers into its scheme to eliminate recalcitrants such as Walters.

It does not add much, though, to call the scheme an "aggregation of trade restraints." The term goes back to *Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 598 (1951), and as used there, and later in *United States v. Sealy, Inc.*, 388 U.S. 350, 354, 357 (1967), just meant that whether a restriction was illegal per se might depend on what other restrictions the defendant had imposed. A later decision in the interminable Sealy litigation, *Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc.*, *supra*, 585 F.2d at 827-28, used a similar approach to conclude that a number of separate provisions in the Sealy licensing agreement, each innocuous in itself, had been combined in such a way as to perpetuate the division of markets that the Supreme Court had held was a per se violation of section 1. All that Walters is asking us to do here is to decide whether its challenge to Morton's system

of marketing raises a triable issue under the Rule of Reason.

It is helpful to recall that at common law a conspiracy was unlawful if the conspirators used unlawful means to a lawful end or lawful means to an unlawful end. *United States v. Addyston Pipe & Steel Co.*, 85 Fed. 271, 293 (6th Cir. 1898), modified and aff'd, 175 U.S. 211 (1899). This is a pretty encompassing definition, and if Walters cannot bring itself within either branch it is unlikely to have a cause of action under section 1. The means, we have seen, were not unlawful, unless the exclusive territories are unlawful; but if they are, Walters can get all the relief it seeks in the trial of the retained claim in the district court. Predatory pricing, alleged in *Coleman Motor Co. v. Chrysler Corp.*, 525 F.2d 1338, 1345 (3d Cir. 1975), on which Walter relies as a case where the goal of the alleged conspiracy was vertical integration into retail distribution, is not alleged here.

The end that Walters alleges is that Morton wanted to take over the retail function; in the terminology of industrial organization, it wanted to integrate forward. But vertical integration is not an unlawful or even a suspect category under the antitrust laws: "Firms constantly face 'make-or-buy' decisions—that is, decisions whether to purchase a good or service in the market or to produce it internally—and ordinarily the decision, whichever way it goes, raises no antitrust question." *University Life Ins. Co. of America v. Unimarc Ltd.*, 699 F.2d 846, 852 (7th Cir. 1983). Morton manufactures some of the building components that it includes in the kits that it sells. It is therefore vertically integrated, because it could buy those components on the market instead. There is nothing abnormal about this. If Morton employs its own typists it is vertically integrated, because it could farm out its typing work to independent contractors. When a corporation that has been using a law firm to handle a particular type of litigation hires a lawyer to do the litigation in-house, it is vertically integrating into litigation services. When a law firm that has been buying a billing service from

a computer time-sharing firm buys its own computer to perform the service, it is vertically integrating into computer services. Vertical integration is a universal feature of economic life and it would be absurd to make it a suspect category under the antitrust laws just because it may hurt suppliers of the service that has been brought within the firm.

A common type of vertical integration is for a manufacturer to take over the distribution of his product. Some manufacturers use wholesalers; others, for example the U.S. automobile manufacturers, do their own wholesaling and thus are vertically integrated into wholesale distribution. Some firms, IBM for example, sell their products directly to the public, rather than through independent retail outlets, and thus are vertically integrated into retail distribution. It was not improper for Morton to want to deal directly with the consuming public rather than indirectly through dealers such as Walters. Of course if it set about to do this in an unlawful fashion it would not be immune from liability just because it had an unexceptionable end in view. But that is only because, as we have noted, a conspiracy to attain a lawful end by unlawful means is actionable.

We just said that vertical integration is not an improper objective. But this puts the matter too tepidly; vertical integration usually is procompetitive. If there are cost savings from bringing into the firm a function formerly performed outside it, the firm will be made a more effective competitor. Moreover, the option of vertical integration places competitive pressure on the firm's suppliers and buyers, who know that if they charge too much for their services the firm may decide to perform them itself. It thus increases competition in the markets for those services. Morton claims that the spiraling costs of building materials forced it to cast about for methods of economizing on its operations, and one method it hit on was to do its own retailing. This is a common motivation for vertical integration. True, some economists believe that monopolistic firms might integrate vertically in order to

deny supplies or outlets to competitors, or to make it more costly for new firms to enter the market (because they would have to enter at more than one level of production or distribution), or to facilitate price fixing with their competitors. See 3 Areeda & Turner, Antitrust Law ¶¶ 725-26 (1978). But nothing of this kind is suggested here. Walters does allege that Morton has a big name in the prefabricated farm buildings market, but there is no indication that this is a meaningful economic market that might be worth monopolizing, or that Morton's purpose in integrating into retail distribution was to make life harder for *its* competitors. Its object was to make more money by reducing the cost of retail distribution, not by coercing or excluding (or for that matter colluding with) its own competitors, whoever they may be, or discouraging potential competitors. Indeed Walters' tie-in claim is premised on the ready availability, from other manufacturers, of the building parts that Morton sells in kits from which Morton Buildings are put together. This shows that Morton has no monopoly.

The final substantive question is whether the district court was correct to dismiss Walters' claim that Morton breached its duty under Wisconsin law to deal fairly with a party with which it had a contractual relationship. The dismissal was on the merits; and if it were not for the fact that Walters and Morton are of diverse citizenship and that the amount in controversy between them exceeds $10,000, there would be a question whether retention of this state-law claim after all the federal claims except the challenge to Morton's use of exclusive territories were dismissed before trial was a proper exercise of pendent jurisdiction; for the relationship between the pendent claim and the only retained federal claim is somewhat distant.

Walters does not charge Morton with a breach of contract, in part because Walters has been unable to produce a copy of any written contract though it claims there was one. The charge sounds in tort. But we share the

special master's perplexity as to what tort is being charged. In Wisconsin as in many other states it is tortious for an insurance company to refuse to pay an insured his claim if the company has no colorable basis for its refusal. See, e.g., *Kanzush v. Badger State Mutual Casualty Co.*, 103 Wis. 2d 56, 61-62, 307 N.W.2d 256, 259-60 (1981); *Anderson v. Continental Ins. Co.*, 85 Wis. 2d 675, 687, 271 N.W.2d 368, 374 (1978). But the tort requires a contractual claim so incontestable that the refusal to honor it must have been in bad faith; here, if Walters has any contractual claim at all, it is so tenuous that Walters is not asserting it. Also the tort has not been extended, in Wisconsin anyway, beyond the insurance setting, where the disparity in resources between insurer and insured has seemed to make the bad-faith breaking of contracts especially reprehensible. Indeed, even in that setting the tort has been defined narrowly, as we pointed out recently in *A.W. Huss Co. v. Continental Casualty Co.*, No. 83-1661, slip op. at 5-15 (7th Cir. May 16, 1984).

Fiduciaries have a duty of fair dealing, of course; and in *Estate of Chayka*, 47 Wis. 2d 102, 176 N.W.2d 561 (1970), this duty was extended to spouses executing a joint will—a special relationship resembling a fiduciary one. But it is a big step from this to reading into every commercial relationship a duty of fair dealing not cabined by contractual provisions, express or implied. Statutes in many states, including Wisconsin, give dealers and franchisees special protections against termination. See Wis. Stat. § 135.03. But Walters does not rely on any statute; it relies on a common law tort concept that is not yet the law in Wisconsin. The common law of Wisconsin does not make the franchisor a fiduciary of his franchisees. *Murphy v. White Hen Pantry Co.*, 691 F.2d 350, 355 (7th Cir. 1982).

This completes our discussion of the matters presented in the appeal, but before ending we want to make an observation about the procedure employed by the district court in this case. Although the use of special masters to assist federal district judges in complex litigation is

not only authorized but indispensable to the effective operation of the federal courts under current workload conditions, its scope is limited by Fed. R. Civ. P. 53(b), as follows: "A reference to a master shall be the exception and not the rule. In actions to be tried by a jury, a reference shall be made only when the issues are complicated; in actions to be tried without a jury, save in matters of account and of difficult computation of damages, a reference shall be made only upon a showing that some exceptional condition requires it." The reference in this case was proper only if required by "some exceptional condition," since it was not made to assist a jury and did not call for an accounting or a damage calculation; and we doubt that this demanding condition was met. Cf. *Bennerson v. Joseph*, 583 F.2d 633, 642 (3d Cir. 1978). In this more than in any other circuit we must be alert to the danger of overusing special masters, for it was overuse by one of our district judges that led the Supreme Court to issue a writ of mandamus in *La Buy v. Howes Leather Co.*, 352 U.S. 249 (1957). Judge La Buy "stated he did not know when he could try the case 'if it is going to take this long.' He asked if the parties could agree 'to have a Master hear' it. The parties ignored this query and the next day [Judge La Buy] entered the orders of reference sua sponte. The orders declared that the court was 'confronted with an extremely congested calendar' and that 'exception [sic] conditions exist for this reason' requiring the references. The cases were referred to the master 'to take evidence and to report the same to this Court, together with his findings of fact and conclusions of law.' . . . [A]ll parties objected to the references . . . ." *Id.* at 253-54 (footnote omitted).

In this case the district judge, also on his own initiative and also because he did not have time for a long trial, and hoping that the special master's report would (as it did) enable the number of issues to be reduced for trial, referred summary judgment proceedings to a special master who prepared a report that the judge then adopted without independent analysis. Since the judge did

not refer the case to the special master for trial, and only one of the parties (Walters) objected, the delegation of judicial power was less extreme than in *La Buy*. But that does not mean it was in conformity with Rule 53(b). Although the materials submitted in connection with the motion for summary judgment ran to several thousand pages, this unfortunately is not unusual in antitrust and other complex litigation; yet it would be contrary to Rule 53(b), as it has been understood and interpreted against a background of concern with the cost and delay created by using masters, to refer summary judgment motions in antitrust cases routinely to masters. See 9 Wright & Miller, Federal Practice and Procedure § 2605 (1971); cf. *MCI Communications Corp. v. American Tel. & Tel. Co.*, *supra*, 708 F.2d at 1169 n. 125.

But unless the delegation of judicial power to the master in this case exceeded the bounds of Article III of the Constitution, it is not reversible error, because Walters has not asked us to reverse the district court's judgment on the ground that the reference to the master violated Rule 53(b). See, e.g., *Hayes v. Foodmaker, Inc.*, 634 F.2d 802, 803 (5th Cir. 1981) (per curiam); 9 Wright & Miller, *supra*, § 2606. The objection was made in the district court but has been abandoned on appeal, so we would not revive it unless we thought the reference was beyond the district court's subject-matter jurisdiction. The district judge delegated a reporting and recommending power rather than the power of decision; it was he, not the master, who entered judgment. True, the master's function was to evaluate a long documentary record and determine whether it presented genuine issues of material fact; the opinion he wrote was indistinguishable in form from a judicial opinion; and the district judge approved that opinion rather than write his own. Walters therefore has a valid gripe about being hustled off to an adjudicative process conducted—and at rather too leisurely a pace—by a private practitioner. If Walters had preserved its objection on appeal we might well reverse, and we would have to do so whether it had or not if we thought the pro-

cedure was so improper as to be beyond the powers granted federal judges by the Constitution, statutes, and rules—which means, practically speaking, so egregious as to warrant reversal even though the issue was not preserved on appeal. We do not think the procedure was quite that egregious, and we naturally are reluctant to prolong the length and increase the expense of this proceeding (already six years old) by vacating the reference on our own initiative. But we trust that in the future the use of special masters in antitrust and other complex litigation will be conducted with greater sensitivity to the problems of excessive delegation of judicial power that such use can create and to the precise language of Rule 53(b), which as we have pointed out requires in a case such as this a showing of "some exceptional condition" justifying the reference to a master.

AFFIRMED.

SWYGERT, *Senior Circuit Judge,* concurring in the judgment.

Walters raises four issues on appeal: (1) whether Morton's trademark was illegally tied to the sale of its building material packages; (2) whether Morton forced Walters to maintain illegally fixed retail prices on periodically advertised specials; (3) whether Walters states a claim under section 1 of the Sherman Act for Morton's alleged predatory scheme to destroy its independent dealers; and (4) whether Morton owed Walters a duty of good faith. I agree with the majority that the district court's disposition of these four issues should be affirmed, although I will address only the first two.

In regard to the tie-in claim, the record can admit of only one conclusion: there was no tie-in because there were not two separate products, *see Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495, 507 (1969). Under any of the analyses adopted by the courts, the Morton trademark did not constitute a

product separate from the Morton building material package. *See, e.g., Jefferson Parish Hospital District No. 2 v. Hyde*, 104 S. Ct. 1551, 1562-63 (1984) (separate products exist where there are separate markets for each product); *Principe v. McDonald's Corp.*, 631 F.2d 303, 309 (4th Cir. 1980), *cert. denied*, 451 U.S. 970 (1981) (franchise package constitutes single product where the "aggregation is an essential ingredient of the franchised system's formula for success"); *Siegel v. Chicken Delight, Inc.*, 448 F.2d 43, 48-49 (9th Cir. 1971), *cert. denied*, 405 U.S. 955 (1972) (trademark used under "business format system" or "rent a name" franchise constitutes separate product from articles used in production of system but trademark used under a "distribution format system" is integrated with the product or products that it represents).

Walters' retail price maintenance claim is hardly worth discussion. Morton legally could advertise its products for direct sales to consumers at any price it wished. Walters admitted that he was faced with the choice of meeting the price advertised by Morton or making no sales. Thus, any actions by Morton to enforce sales at the advertised price were unnecessary and could not have caused Walters a compensable antitrust injury. *See Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 487-89 (1977).

Unfortunately, I cannot concur in much of the discussion contained in the majority opinion, not because that discussion may not state correct principles of law, but because I believe it is dicta—dicta that might tend to influence and prejudice decisions in cases yet unborn but which may come to this court for review. It could be argued that the discussion of matters other than those actually raised by this appeal has a certain peripheral relevance, but such relevance, if it exists at all, is unnecessary for an understanding and treatment of this case. It is axiomatic, of course, that we should confine our discussion to the legal principles applicable to the case at hand. Shadows cast beyond the facts of a particular case tend to confuse the trial judges and haunt

our own appellate court—inhibiting our freedom to decide future cases according to what we perceive to be the applicable law at that time.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES DISTRICT COURT

JACK WALTERS & SONS CORPORATION

v.

MORTON BUILDINGS, INC.

Amended Judgment dated July 1, 1983

Decision by Court. This action came on for consideration before the Court with the judge Terence T. Evans presiding and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

That defendant's motion for summary judgment as to the first (except such portions thereof as relate to territorial restrictions and damages resulting therefrom up until but not beyond the dates of termination of plaintiff's dealership), second, third, fourth and fifth claim of plaintiff's complaint, pursuant to the decision and order entered March 11, 1983 is granted. The claims are dismissed.

/s/ *Terence Evans*
U.S. District Judge

Dated: July 1, 1983

UNITED STATES DISTRICT COURT

JACK WALTERS & SONS CORP.

v.

MORTON BUILDINGS, INC.

Judgment dated June 24, 1983

Decision by Court. This action came on for consideration before the Court with the judge Terence T. Evans presiding and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

That defendant's motion for summary judgment as to the second, third, fourth and fifth claims of plaintiff's complaint, pursuant to the decision and order entered March 11, 1983, is granted. The claims are dismissed.

/s/ *Regina J. Toicuri*
Deputy Clerk

Dated: June 24, 1983

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Civil Action No. 78-C-329

JACK WALTERS & SONS CORP.,

Plaintiff,

v.

MORTON BUILDINGS, INC.,

Defendant.

DECISION and ORDER

In an order dated April 8, 1981, I appointed Attorney Bruce C. O'Neill of Milwaukee, Wisconsin, to serve as a Special Master in this case. Subsequently, the defendant Morton Buildings, Inc. filed a motion for summary judgment. Briefs in support of and in opposition to the motion were filed. On October 29, 1982, Special Master O'Neill submitted a report and recommendation on the motion.

After reviewing the Special Master's Report, I scheduled oral arguments and heard from John Skilton on behalf of the plaintiff and Rick O'Neil on behalf of the defendant. In addition, I have received written comments from each side on the appropriateness of the Special Master's Report.

I have now completed a review of the briefs filed on the summary judgment motion. I have also reviewed the post-Special Master Report comments which, as far as the plaintiff is concerned, are essentially a rehash of its brief in opposition to the motion for summary judgment. I have also considered the arguments of counsel made in court during the hearing on December 17, 1982.

Having considered all of the above, I have determined that no useful purpose would be served by my replowing the same fields that have been worked by the Special Master. I believe the Special Master's Report to be a thorough and comprehensive review of the facts in this case and the applicable law. More importantly, I agree with the Special Master's analysis of the issues and I adopt in total, as the opinion of the court, the Special Master's Report of October 29, 1982.

Accordingly, IT IS ORDERED that the defendant's motion for summary judgment be granted as to the plaintiff's Second, Third, Fourth and Fifth Claims of its amended complaint and as to all portions of the First Claim except those relating to territorial restrictions and as to the only surviving issue, damages, if any, are limited to those allegedly suffered by the plaintiff prior to its termination by Morton.

As to the limited remaining issues, IT IS ORDERED that counsel appear for a brief status conference on March 31, 1983, at 9:00 a.m.

Dated at Milwaukee, Wisconsin, this 11 day of March, 1983.

By The Court:

/s/ *Terence Evans*
Terence T. Evans
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF WISCONSIN

C.A. No. 78-C-329

JACK WALTERS & SONS CORP.,

Plaintiff,

vs.

MORTON BUILDINGS, INC.,

Defendant.

SPECIAL MASTER'S REPORT ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

FACTS

Defendant Morton Buildings, Inc. ("Morton"), an Illinois corporation, has brought a motion for summary judgment against plaintiff Jack Walters & Sons Corp. ("Walters"), a Wisconsin corporation. Walters brought this action against Morton on May 25, 1978 seeking injunctive relief and damages based on Morton's allegedly unlawful termination of Walters' dealership and various alleged antitrust violations. The court previously denied Walters' motion for a preliminary injunction.

Morton has sold farm, commercial and industrial "pole" buildings since 1949.[1] Morton is currently the largest

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[1] Morton originally did business under the name Interlocking Fence Company. After changing the name to Morton Buildings, Inc. in the 1950s, Morton ceased selling its buildings through general retail outlets and developed its own system of company-owned sales offices.

seller of such buildings in the United States with over 70 Morton-owned sales offices located in 21 states. Although Morton buildings are not patented, Morton has developed substantial goodwill in its trade name, trademark and also in its logos which appear on the front of its buildings. This goodwill and market acceptance is in part due to Morton's advertising and marketing practices and also in part due to the quality of materials and construction.

In the 1960s and early 1970s, in addition to its own sales offices, Morton sold its buildings through a total of six independent dealers, each of which had requested a Morton dealership. In 1968 the dealers operated 11 independent sales offices. Walters became Morton's first independent dealer in 1962 and was the last remaining independent seller of Morton buildings when Morton terminated its dealership in 1978.[2]

Morton utilized the same basic method of operations with Walters as it did with the other independent dealers and with its own sales offices. After deciding to purchase a Morton building, the purchaser executed a purchase order prepared by Walters and issued under its name. Walters then paid to Morton an amount determined by Morton as the wholesale price of the purchased building. Upon receipt of the signed purchase order and Walters' tender of the building's wholesale price, Morton shipped to the construction site all of the materials needed to construct the completed building.

Morton had the building components sent to the job site from two sources. Certain materials such as lumber, sheet metal, doors, windows and insulation were not manufactured by Morton but were purchased from various sup-

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[2] At one point Walters owned and operated six offices, all of which were located in Wisconsin.

pliers. Morton, at its own plant, ribbed and formed the steel sheets into a roof and siding, manufactured the trusses used to support the roof, and sometimes cut lumber into specified sizes.

The materials shipped to the job site generally bore a sign or placard designating that they represented a "Morton Building". Materials not manufactured by Morton were often shipped in original cartons carrying the suppliers' names.

Once the materials arrived at the job site, the building was erected, usually by Walters' crews, in accordance with specifications contained in Morton's operations manual. Once the construction of the building, which took between 120 and 170 hours, was completed, the building often bore a sign designating its status as a "Morton Building."

Jack Walters first became a Morton dealer by contacting Henry Getz, Morton's president, after viewing a constructed Morton building. The parties did not execute a written dealership agreement,[3] although it was understood that Wisconsin was to be Walters' operating territory. Walters did not act in the corporate form until 1966.

Although Walters did business under the Morton name for a short period of time, it operated under its own name, at Morton's insistence, for the majority of its association with Morton. Although manuals put out by Morton governed Walters' manner of acquiring building purchase orders and erecting Morton buildings, the buildings themselves were covered by a warranty issued at Morton's insistence by Walters. Both Morton and Walters advertised the sale of Morton buildings. Morton's advertisements

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[3] Although Morton developed a written dealership agreement in 1974, it was never utilized because no new independent dealers were formed.

generally included the names and addresses of its dealers and sales offices, including Walters.

Morton has required since 1968 that Walters, along with other dealers and sales offices, purchase from Morton all of the materials required to construct a Morton building, including those materials not manufactured by Morton and which could be purchased elsewhere at a lower price.[4] Beginning in 1976 and at sporadic periods thereafter, Morton increased the wholesale prices which it charged to its dealers and sales offices. Morton contends that the price increases reflected the rising costs of various materials such as steel. Walters contends that it was unable to increase its retail prices in accordance with the wholesale price increase because it would have been unable to compete with other building sellers.

Walters thereafter suffered reduced profits despite an increase in its sales volume. Walters claims that Morton's price increases were intended to force Walters, and did force the other independent dealers, out of business.[5] Morton, on the other hand, contends that because its wholesale price increased covered only a portion of its own increased prices, it also lost profits.[6]

Since at least 1970, Walters repeatedly requested that Morton allow it to purchase building components from

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[4] Morton, at times, has allowed Walters to purchase an isolated item from another source, where Morton was unable to provide the item or it was very impractical for Morton to do so.

[5] Each of the five independent dealers sold its business to Morton upon the termination of its dealership. Morton then operated its own sales office out of each former dealership and hired many of the terminated dealers' employees.

[6] Morton has agreed that the losses suffered by its own sales offices were only losses in the internal accounting sense.

other suppliers. Walters also requested that Morton reduce or rescind its wholesale price increases so that Walters could raise its profit margin. These requests were denied by Morton.

At an October 1977 meeting with Morton, Walters reiterated its requests for reduced wholesale prices and the authority to purchase materials from different suppliers. Walters also informed Morton that it was considering selling its own line of buildings, using materials purchased from other suppliers at a lesser price. In a January 1, 1978 letter to Morton, Walters stated that it was going to sell its own line of "Walters Buildings" in addition to Morton's buildings. Walters stated that it would continue to accept orders for Morton buildings and that Morton's sales would be "substantial" if Morton's wholesale prices were competitive with that of Walters' other line.

Thereafter, Morton, in a January 17, 1978 letter to Walters, terminated Walters' dealership effective June 1, 1978. Morton's letter stated that Walters was not adequately representing Morton, because it represented its own line as better than Morton's, and because Walters sold its line at a lesser price. Morton also stated that Walters was engaged in a conflict of interest.

Walters responded in a March 23, 1978 letter that it would discontinue selling Morton buildings and would instead sell its own line pending resolution of the parties' dispute. Walters stated, however, that it still desired to sell Morton's buildings.

Walters' amended complaint alleges four basic claims: (1) violation of Section 1 of the Sherman Act, 15 U.S.C. Sec. 1, and Section 3 of the Clayton Act, 15 U.S.C. Sec. 14, through (a) illegal tying, (b) resale price maintenance and (c) territorial restrictions; (2) violation of Section 1 of

the Sherman Act and Section 3 of the Clayton Act through unlawful termination;[7] (3) lack of good faith and fair dealing; and (4) unfair competition through solicitation of employees.[8]

THE STANDARD

Morton's motion for summary judgment may only be granted if no material facts are in dispute and Morton is entitled to judgment as a matter of law. Fed.R.Civ.Pro. 54. While the standards required under a motion for summary judgment are strict ones, they do not become more strict solely because the complexities of an anti-trust case are involved. *Lupia* vs. *Stella D'Oro Biscuit Co.*, 586 F.2d 1163, 1166 (7th Cir. 1978), cert. denied 440 U.S. 982 (1979).

To the contrary, the very nature of anti-trust disputes "encourage[s] summary disposition of such cases where permissible," because the treble damage remedy fuels vexatious litigation and large amounts of time and money expended in discovery and trial. *Lupia, supra,* 586 F.2d at 1166.

> "Anti-trust actions have proven to be specially protracted, and difficult for jury consideration. . . .
>
> "We simply cannot turn our heads and ignore the practical realities of complex anti-trust litigation. A

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[7] The viability of this claim depends, of course, on the success of Walters' other claims. Unless Mortons' termination was based on an act or practice violative of the anti-trust laws or Morton's duty of good faith, Walters has no recourse against Morton's decision, for whatever reason, to terminate its dealership.

[8] Walters' amended complaint also contains a fifth claim that Morton violated the Wisconsin Fair Dealership Law, Chapter 135, Stats. In light of *Wipperfurth* v. *U-Haul Co. of Western Wisconsin*, 101 Wis.2d 586, 304 N.W.2d 767 (1981), Walters has dropped this claim.

> trial of this nature places a substantial burden on jurors who are seldom prepared to analyze the complexities of anti-trust claims. . . .
>
> "[W]hen the parties have designated the evidence upon which they will rely at trial, and the Court has had an opportunity to review the evidence and concludes that no reasonable jury could return a verdict for plaintif[f], judicial economy mandates that summary judgment be entered."

Weit vs. *Continental Illinois National Bank and Trust,* 641 F.2d 457, 464 (7th Cir. 1981).

Walters has argued strenuously and at length in its brief and supporting materials that Morton's summary judgment motion shouud be denied because "hotly contested" factual issues exist which may only be resolved at trial. A thorough review of the voluminous materials submitted by the parties reveals that, with one exception, the issues of fact which exist are either not material or are only remotely relevant to the claims presented by Walters. The one exception is that portion of the first claim which alleges a violation of Section 1 of the Sherman Act through territorial restrictions. Because the undisputed material facts entitle Morton to judgment as a matter of law on all other claims, Morton's motion should be granted as to those claims but denied as to the territorial claim.[9]

TYING ARRANGEMENT

Walters' basic claim against Morton is that Morton, by requiring Walters to obtain all of its Morton building materials from Morton as a condition to its continuation as a Morton dealer, created an illegal tying arrangement

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[9] Thus, Morton's contention that the preliminary injunction should control this motion, although unpersuasive, need not be addressed.

in violation of Section 1 of the Sherman Act[10] and Section 3 of the Clayton Act.[11] A tying arrangement occurs where one is forced to purchase an unwanted (tied) product in order to purchase a desired (tying) product. *Northern Pacific R. Co.* vs. *United States*, 356 U.S. 1, 6, 785 S.Ct. 514, 2 L.Ed.2d 545 (1958). Walters alleges that the tying product is the Morton trademark and that the tied products are the materials used in the packaging and assembly of Morton buildings.

A tying arrangement is illegal per se where (1) the tying and tied products are separate and distinct; (2) the tying product possesses sufficient economic power to appreciably restrain competition in the tied product; and (3) a "not insubstantial" amount of commerce is affected by the tying arrangement. *Siegel* vs. *Chicken Delight*,

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[10] Section 1 of the Sherman Act, 15 U.S.C. Sec. 1, provides "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal."

[11] Section 3 of the Clayton Act, 15 U.S.C. Sec. 14, provides in relevant part:

"It shall be unlawful for any person engaged in commerce . . . to . . . make a sale or contract for the sale of goods, wares, merchandise, machinery, supplies or other commodities . . . or fix a charge therefore or discount from, or rebate upon, such price on the condition, agreement or understanding that the . . . purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies or other commodities of a competitor or competitors of the . . . seller, where the effect of such . . . sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly. . . ."

Morton has argued in its brief that this case does not involve "goods, wares, merchandise, machinery, supplies or other commodities" so as to trigger the application of the Clayton Act. Because the undisputed facts reveal that no violation of the Clayton Act occurred in this case, the court need not address this argument.

Inc., 448 F.2d 43, 47 (9th Cir. 1971), cert. denied 405 U.S. 955 (1972). Morton does not dispute the existence of the last two factors.

The policy against tying arrangements is aimed at the manipulation of a purchaser's desire for a product which is dominant in one market to coerce him into an unwanted purchase of a product which is less dominant in another market. Competitors are thus denied access to the tied product market, because the economic leverage of the tying product results in the purchase of both the tied and tying products from the party imposing the tying arrangement. *Northern Pacific R. Co., supra,* 356 U.S. at 6, 78 S.Ct. 514, 2 L.Ed.2d 545 (1958). "By shutting competitors out of the tied product market, tying arrangements serve hardly any purpose other than the suppression of competition." *Siegel, supra,* 448 F.2d at 47, citing *Standard Oil Co.* vs. *United States,* 337 U.S. 293, 305-6, 69 S.Ct. 1051, 93 L.Ed. 1371 (1949).

If a per se violation is not found, a tying arrangement nonetheless may be analyzed to determine whether, under the rule of reason, a violation of the anti-trust laws has occurred. *Fortner Enterprises, Inc.* vs. *U.S. Steel Corp.*, 394 U.S. 495, 500, 89 S.Ct. 1252, 22 L.Ed.2d 495 (1969); *Anderson Foreign Motors* vs. *New England Toyota, Etc.*, 475 F.Supp. 973, 981 (D.Mass. 1979).

A crucial requirement of an illegal tying arrangement, however, is the existence of two distinct products. *Fortner Enterprises, Inc., supra,* 394 U.S. at 507, 89 S.Ct. 1252, 22 L.Ed.2d 495 (1969). Because the material undisputed facts show that the Morton trademark is inextricably interwoven with the aggregation of materials comprising the Morton building, the trademark in this case cannot be considered a separate product from the building materials and no illegal tying arrangement thus exists.

No set standard has been formulated for the evaluation of whether an alleged tying product is in actuality so related to the tied product (or vice versa) that one is but part and parcel of the other. The analysis becomes more complex where a trademark or franchise is alleged to be the tying product. While a trademark may under appropriate circumstances be considered a separate product, the methods of analysis utilized by the courts are no less varied than those developed in the consideration of other aspects of the two-product issue. A thorough review of the many approaches to this question, including that of Walters' expert Prof. Mueller, reveals that under each type of analysis the alleged tying product (Morton trademark) is so inextricably intertwined with the alleged tied products (materials comprising the Morton building) that it cannot be viewed as a separate and distinct entity.

—*Seventh Circuit*

The most recent case decided by the Seventh Circuit is *Photovest Corp.* vs. *Fotomat Corp.*, 606 F.2d 704 (1979), *cert. den.* 445 U.S. 917 (1980). The court in *Photovest* held that the Fotomat franchise/trademark was a separate product from both photo processing and a lease which a franchisee was required to acquire from Fotomat. Both of these requirements were held to be illegal tying arrangements. 606 F.2d at 724-5.[12]

The instant facts are, however, distinguishable from those of *Photovest*. *Photovest* concerned the sale of an entire business entity with the franchisee acquiring and utilizing the name of the franchisor as its own and with the franchisee paying a monthly royalty to Fotomat based on gross sales. Fotomat sold 355 such franchises during its first four years in the franchise business. The franchise per-

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[12] For a similar enterprise or business format or rent-a-name franchise, see *Ohio-Sealy Mattress, Mfg. Co.* v. *Sealy, Inc.*, 585 F.2d 821 (7th Cir. 1978), cert. denied 440 U.S. 930 (1979).

mitted the franchisee to operate a drive-thru photo-finishing business out of a distinctive Fotomat kiosk. Morton did not in any way sell its trademark as distinguished from its building packages to Walters.

—*Ninth Circuit*

The first detailed discussion by the Ninth Circuit of the two-product issue as it relates to the use of trademarks was articulated in *Siegel, supra.* In *Siegel,* the defendant franchisor licensed to its franchisees the right to use its method of operations to prepare and market fast food products under its trademark. In turn, it required the franchisees to purchase certain cooking equipment, food supplies and paper packaging exclusively from the franchisor.

The court held that the *Chicken Delight* franchise/trademark (tying product) was distinct from the equipment, mixes and paper products (tied products) required to be purchased from Chicken Delight, and that an illegal tying arrangement existed. In so doing, the court analyzed the "function of the aggregation", including whether the "amalgamation of products" resulted in cost savings and whether the items were generally sold or utilized as a unit. 448 F.2d at 48. In addition, the court scrutinized the relation of the trademark to the tied products, stating, 448 F.2d at 48-9:

> "The burgeoning business of franchising has made trademark licensing a widespread commercial practice and has resulted in the development of a new rationale for trademarks as representations of product quality. This is particularly true in the case of a franchise system set up not to distribute the trademarked goods of the franchisor, but as here, to conduct a certain business under a common trademark or trade name. Under such a type of franchise, the trademark simply reflects the goodwill and quality standards of the enterprise which it identifies. As

> long as the franchisee lives up to these quality standards and remains as represented by the mark so that the public is not misled, neither the protection afforded the trademark by law nor the value of the trademark to the licensee depends upon the source of its components.
>
> "This being so, it is apparent that the goodwill of the Chicken Delight trademark does not attach to the multitude of separate articles used in the operation of the licensed system or in the production of its end product. It is not what is used, but how it is used and what results that have given the system and its end product their entitlement to trademark protection. It is to the system and the end product that the public looks with the confidence that established goodwill has created."

The *Siegel* court's analysis was recently expanded and refined in *Krehl* vs. *Baskin-Robbins Ice Cream Co.*, 664 F.2d 1348 (9th Cir. 1982). In *Krehl*, the court held that no illegal tying arrangement existed where a Baskin-Robbins franchisee was required to purchase its ice cream from an area franchisor. In reasoning that the Baskin-Robbins franchise was inextricably linked to the ice cream sold by the franchisee, the court expanded on the differentiation, earlier referred to in *Siegel*, between the "business format" and "distribution format" franchise systems.

Under a "business format" system as occurred in *Siegel*, the franchisor provides the trademark ("Chicken Delight") under which the franchisee conducts its business and assumes full responsibility for the production and preparation of the end product. Because only a remote connection exists between the trademark and the products which the franchisees are required to purchase, the consumers have no reason to associate the tying and tied products. The trademark represents "the goodwill and quality standards of the enterprise which it identi-

fies." 664 F.2d at 1353, quoting *Siegel, supra,* 448 F.2d at 48-9.

On the other hand, under a "distribution format" system as existed in *Krehl,* the franchisees are merely conduits through which the trademarked goods of the franchisor flow. In this situation the trademark represents the end product produced through the franchise system, and the desirability of such trademark ("Baskin-Robbins") depends on the perceived quality of the product which it represents (ice cream):

> "The desirability of the trademark and the quality of the product it represents are so inextricably related in the mind of the consumer as to preclude any finding that the trademark is a separate item for tie-in purposes." 664 F.2d at 1353-4.

Krehl thus focused on the relationship between the franchisor and franchisee in evaluating the function of the trademark.

The undisputed material facts show that, if Morton is a franchisor in any respect, it was operating a "distribution format" system as occurred in *Krehl* and not the "business format" system exemplified in *Siegel.* Morton neither is in the business of selling or licensing franchises nor sold a particular franchise to Walters. Indeed, Walters did not conduct its business under the "Morton Buildings" name but operated as an independent entity apart from Morton. Walters represented itself as a "builder" of Morton buildings, with Morton retaining the role of supplier, and conducted all aspects of its business, including its office designation, advertising and the execution of building purchase orders, under its own name.

While Walters sold and erected Morton buildings it was, in actuality, a conduit through which Morton distributed its buildings to the customers. Consumers did

not purchase a "Walters building", although they purchased a building from Walters. Rather, they purchased a specific type of building package—the "Morton Building"—whose quality is confirmed by the building package's source-name identification. The quality of the "Morton Building" name is dependent upon the quality of the source of the building itself—the individual material components. The quality of the trademark thus cannot be separated from the quality of the product which it represents.[13]

—*Fifth and Sixth Circuits*[14]

Trial courts in the Fifth and Sixth circuits have analyzed the two-product question in terms of whether the alleged tying trademark is a representation of product quality or of product origin.[15] The distinction between the two types of trademarks was explained in *Refrigeration Engineering Corp.* vs. *Frick Company*, 370 F.Supp. 702, (W.D.Tex. 1974). In *Frick*, a factor (distributor) was terminated by a manufacturer for failing to enthusiastically promote the Frick line of products. In denying the

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[13] In this respect the tied products are not remote from the trademark which, in fact, represents their source and identity.

[14] Walters has referred the court to *Carpa, Inc.* v. *Ward Foods, Inc.*, 536 F.2d 39 (5th Cir. 1976). *Carpa* is distinguishable because it dealt with a pure "enterprise franchise" which does not exist in this case. The discussion in the parties' briefs in this case revolves around *Carpa's* discussion of the injury resulting from an illegal tie-in. While *Carpa's* analysis of this issue is unpersuasive, it need not be addressed because of the conclusion that an illegal tying arrangement does not exist.

[15] A trial court in the Ninth Circuit also has utilized this analysis. See *Mid-America ICEE, Inc.* v. *John E. Mitchell Co.*, 1973-2 Trade Cases ¶74,681 (D. Ore. 1973).

factor's motion for a preliminary injunction, the court stated, 370 F.Supp. at 711:

> "While lower courts have, in some recent cases, held that a trademark may be a separate product to which another product may be tied, these cases make it clear that only certain specific trademarks, of the "representation of product quality" type, may be separate products and therefore be involved in tying. Such trademarks are in fact separately marketable, and are sold by "rent-a-name" type franchisors. They are not simply "representation of product origin" type trademarks, which are not sold separately. . . .
>
> "The court is impressed by the argument of defendant that, to hold that a distributorship relationship is a tying product, to which is tied all products which a manufacturer desires to sell, would render all exclusive dealing arrangements per se illegal. . . ."

See also *Detroit City Dairy, Inc.* vs. *Kowalski Sausage Co., Inc.*, 393 F.Supp. 453 (E.D. Mich. 1975).

Walters' argument that the Morton trademark is a representation of product quality, as opposed to product origin, is unpersuasive. Walters has agreed that one of the selling points of a Morton building is that all of the materials comprising the building package are derived from one source—Morton.[16] Whether Morton itself pur-

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[16] Walters argues that the question is not whether the materials are essential to the consumer's perception of the trademark but whether the materials are essential to the franchise. This factor is only relevant after a per se violation is found to exist, when the question of justification arises. *Principe* v. *McDonald's Corp.*, 631 F.2d 303, 309 (4th Cir. 1981); *Kugler* v. *AAMCO Auto Transmission, Inc.*, 460 F.2d 1214, 1216 (8th Cir. 1972); *Siegel, supra*, 448 F.2d at 49; *Kowalski, supra*, 393 F.Supp. at 460, 471. Further, Walters' claim that the materials are not essential to the Morton buildings because they can be obtained from other sources begs the question. While the precise materials selected by Morton may be interchangeable with other similar materials, it is Morton's stamp of approval on these materials which is essential to the success of the Morton trademark.

chased some of its materials from different suppliers is irrelevant because the trademark represents that whatever materials used have been chosen by Morton. Thus, while the Morton trademark does represent the quality of the product sold—the building package, it does so in the context of the quality of the source of materials comprising the product.

Further, under the standard articulated in *Frick,* the trademark is not a representation of product quality because Morton is not in the business of selling franchises. Indicative of this is the fact that Morton wanted Walters to operate its business under its own name. In addition, although Morton at one time had six independent dealers, these dealers were merely an adjunct to its own retail outlets which formed the crux of its operations.

Morton does not market its trademark independent of its building packages, or utilize it aside from the sale or advertisement of Morton buildings. Under these facts, the Morton's trademark was a representation of the origin of its products and was not a mere representation of product quality.

—Tenth Circuit

The Tenth Circuit evaluated the two-product claim in terms of the "most important product" in *Redd* vs. *Shell Oil Co.,* 524 F.2d 1054 (10th Cir. 1975), cert. denied 425 U.S. 912 (1976). In *Redd,* the plaintiff, a "jobber" who purchased oil products from the defendant for resale to the public, was prohibited from selling oil products other than the defendant's under the defendant's name. While the plaintiff in *Redd,* in contrast to Walters, was allowed to sell products other than the defendant's, the plaintiff, like Walters, did not hold a franchise as that term is gen-

erally understood. Like Walters, the plaintiff operated his own business under his own name. The court in *Redd* held that the Shell trademark was not a separate product from the fuel which it represented, stating that "the most important product sold was the gasoline . . . this was the typical sale of a trademarked product." 524 F.2d at 1057. See also *Barnosky Oils, Inc.* vs. *Union Oil Co. of Calif.*, 1979-1 Trade Cases ¶62,668 (E.D. Mich. 1978).

Under the *Redd* analysis, the Morton trademark is not a separate product from the building, because the most important product sold under it is the Morton building package. Walters' claim[17] that *Redd* is "fundamentally different" because the plaintiff did not manufacture the end product is without merit. Contrary to the assertions of Walters and its expert Prof. Mueller, Walters did not "manufacture" a building by constructing it from a truckload of materials shipped to the job site. Although the erection of the building may have had a certain "value added" quality, any such value was minimal in relation to the actual value of the materials in each building package.

—First Circuit

Anderson, supra, is one of the few cases which has attempted to bring together the various factors articulated by the courts in analyzing the two-product issue. The Massachusetts District Court in *Anderson* held that an illegal tying arrangement existed where foreign car dealers were required to accept the delivery services offered by a distributor in order to receive automobiles for sale to the public. After examining several two-product cases, in-

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[17] Walters' makes the same claim with regard to *ICEE, supra,* and *Frick, supra.* Its argument is also unpersuasive as applied to these cases for the same reasons discussed in the basic text.

cluding *Siegel, supra,* the court drew out the following factors as common to the evaluation of a "single product" claim:

(1) the structure of the alleged single product;

(2) the market practices of the defendant with respect to the product;

(3) the behavior of other industrial sellers of the product; and

(4) the efficiency or business justification for the combination of the tied and tying product.

475 F.Supp. at 982.

As with the decisions of the other courts discussed herein, the correct application of the criteria suggested in *Anderson* to the undisputed facts reveals that, as a matter of law, the Morton trademark is not separate from the package of building materials which it represents. Contrary to Walters' assertions, the "product" supplied by Morton and sold by Walters is more than isolated pieces of lumber, doors, windows and hardware. Rather, it is a complete building package, the quality of which is represented by the package's source—Morton. While the basic Morton building package may be modified to a small degree by the desires of an individual purchaser, each building package varies only slightly from the next. All packages are sold as a single unit, and the purchaser is not charged separately for the materials used.

Morton's marketing practices are calculated to promote its buildings as single-unit packages, and, more importantly, as "Morton Buildings." The truckload of shipped materials and the completed building bear signs which denote the entire group of materials as representing a Morton building. Its advertisements further emphasize that the

consumer is purchasing a particular building package which reflects the quality of the package's source.

The facts raised by Walters to show that Morton does not follow the industry norm in requiring its dealers to purchase all materials from Morton are irrelevant to the instant case. The first company relied on by Walters, Doane Agricultural Services, has not been in business for over 12 years. While it was in business, it also marketed building designs as opposed to mere building packages. Another company relied on by Walters, Bonanza, is in the business of selling franchises. Its business organization and relation with its franchisees are thus basically distinct from that of Morton. The third company, Wickes, never executed the agreement referred to by Walters and later altered its own policy to require that its franchisee purchase all of its materials from Wickes. Walters has provided no other evidence from which the court could conclude that Morton's policies are atypical of those of similar businesses in the "package" building industry.

While *Anderson* considered the business justification for the combination of the tied and tying product to be a factor in the determination of whether a single product in fact exists,[18] the great majority of courts have reached this question only after determining whether a single product exists in the first instance.[19] This appears to be the better

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[18] The court in *Anderson* held only that the question of business justification enters after a prima facie per se violation is found to exist. 475 F.Supp. at 981. While, as a matter of law, two products do not exist in this case, the discussion of *Anderson* following this footnote is necessary to avoid additional clouding of this already foggy issue.

[19] See *Ware* v. *Trailer Mart, Inc.*, 633 F.2d 1150 (6th Cir. 1980); *Ohio-Sealy Mattress Mfg. Co.* v. *Sealy, Inc.*, 585 F.2d 821 (7th Cir. 1978); *Northern* v. *McGraw Edison Co.*, 542 F.2d 1336 (8th Cir. 1976); *Siegel, supra*, 448 F.2d at 43; *Susser* v. *Carvel Corp.*, 332 F.2d 505 (2nd Cir. 1964).

reasoned approach. The question whether a single product exists or whether two products are really involved has come down, in each approach followed by the courts, to the function of the tying product in relation to the tied product. If the nature of Morton's trademark is such that it cannot be separated from the building package which it represents, whether a less costly alternative can be found or whether certain of its materials are interchangeable is irrelevant. If, on the other hand, two distinct products exist, the justification for the illegal tying arrangement is then put in issue. Although there is no need to apply *Anderson's* "justification" factor to the initial determination of the two-product issue, the undisputed facts are more than satisfactory to show that under the remaining factors discussed in *Anderson*, Morton's trademark is not, as a matter of law, a separate product from the materials comprising the Morton building.

MUELLER ANALYSIS

Walters has relied extensively on the affidavit of its expert, Prof. Mueller, which analyzes the two-product issue in relation to certain economic factors. The factors articulated by Prof. Mueller are as follows:

(1) Responsibilities and contributions of the parties.

(a) Is the dealer merely a distributor of a product or does it operate an enterprise that makes the product?[20]

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[20] Prof. Mueller views Morton's business as a manufacturing or processing business type of the enterprise franchise, under which the franchisor provides the "ingredients" for the product which is ultimately constructed by the franchisee.

(b) How much value does each party contribute to the product?

(c) Which party assumes responsibility for warranting the end product?

(d) What are the customers' perceptions of the functions performed by the parties?

(2) Industry practices regarding product separability.

(a) Do firms in the same or similar industries sell the products separately?

(3) Motives in imposing the tie-in.

(a) Is it necessary to protect the quality of the end product?

(b) If quality control is essential to creating the product, can it be imposed by less restrictive means?

(c) Is coercion used to increase profits in selling the tied product?

Several of Prof. Mueller's factors are irrelevant to the determination of whether two products exist. Further, the undisputed facts, when applied to the remaining factors, reveal that in contrast to Prof. Mueller's conclusion only one product exists in this case.

Responsibilities and Contributions of the Parties.

(a) Prof. Mueller's attempt to characterize Morton's business as an enterprise franchise is unpersuasive. Morton was never in the business of selling franchises. While the independent dealers may have contributed significantly to Morton's sales percentages, Morton, during its 33-year involvement in the industry (including its predecessor com-

pany), operated predominantly through its own retail outlets or sales offices.

Prof. Mueller accurately suggests that Morton's relation with its dealers is *more like* the "manufacturing" enterprise, under which the franchisee often constructs the end product, than the "product" enterprise, under which the franchisor retains total operational control. However, even under Prof. Mueller's analysis, an enterprise franchise ("product" or "manufacturing") is one in which the franchisee's business is established and identified with the franchisor's trademark. In the instant case Walters operated under its own name. Even if, as Prof. Mueller states, an enterprise franchise may exist without the franchisee adopting the franchisor's name, Walters has not established and identified its business enterprise with the Morton name. Its purchase orders, advertisements, employee apparel and business cards, while at times indicating that Walters sells Morton buildings, all retain Walters' identity as separate from that of Morton.

(b) Prof. Mueller places great reliance on the value added to the completed building by Walters, primarily as a result of Walters' erection of the truckload of materials into the completed building. However, Walter's own figures show that Walters' construction constituted only approximately 10% of the value of the completed building package. Walters' remaining contribution resulted basically from its goodwill. Contrary to Prof. Mueller's contention, Morton has contributed the majority of the value of the completed building through its provision of the building package components, its assurance of the quality of such materials through its selection process, and its overall supervision of Walters' marketing practices.

(c) Prof. Mueller's reliance on Walters' warranty on the completed building package is misplaced. Walters is the logical party to warrant its own construction of the

building. Morton, on the other hand, warrants (to Walters) the quality of the building package materials which it has selected and provided to Walters' crew for erection. Morton's warranty is more significant than Walters', because it reaffirms the status of the Morton trademark as a representation of the origin of the building package rather than a mere representation of the quality of the building itself.

(d) Prof. Mueller also relies on a study in which farmers chose guaranties, warranties and follow-up services as the most important factors in selecting a builder from which to purchase a farm building. This, however, only shows that these qualities were important factors in their selection of Walters, which represented itself as the builder of the Morton package. It reveals absolutely no information relative to the customers' perceptions of Morton, which consistently has designated itself as the supplier of the building packages.

Under a different study cited by Prof. Mueller, a higher percentage of farmers chose Morton buildings because of the quality of the materials and construction than chose other brands for those reasons. Among purchasers of Morton buildings, the quality of workmanship and materials was ranked as a more important factor than the warranty, reputation of the builder (Walters) or price. The warranty issued by Walters was much less of a selling point. Thus, customers purchased the Morton buildings because of the source/quality represented by the Morton name.

Industry Practices. The companies relied on by Prof. Mueller as representative of industry standards were discussed in relation to *Anderson, supra,* and need not be repeated here.

Morton's Motive. As previously discussed in relation to *Anderson, supra,* Prof. Mueller's inclusion of Morton's motive for requiring Walters to purchase the building

package materials from Morton is irrelevant to the initial determination of whether two products exist. *Siegel, supra,* 448 F.2d at 49. Just as the good faith of a franchisor cannot merge two different products into one, "a single product does not become separate and distinct products because of a malevolent intent." *ILC Peripherals, Etc.* v. *International Bus.,* 448 F.Supp. 228, 234 (N.D. Cal. 1978).

Thus, under the analysis of Professor Mueller and of the courts, the Morton trademark is not a separate product. While the foregoing portion of this report is unusually long, an extended discussion was warranted due to the complexities of the tying issue, the cloudiness of the various court decisions and the able, although massive, presentations made by the parties. The conclusion reached, however, is analogous to the Morton building package. It, like the Morton trademark, represents the quality of the source of the materials—the application of the facts to the legal standards—which comprise the "legal package"—the law of tying arrangements. Just as the goodwill associated with the conclusion reached is attributable to the quality of the source of the "legal package" materials, the goodwill associated with Morton's trademark is attributable to the quality of the source of the building package materials.

Thus, the court's decision will be inextricably intertwined with the materials comprising the law of tying arrangements just as Morton's trademark cannot be separated from the materials comprising the Morton building. Because one crucial requirement for an illegal tying arrangement—the existence of two distinct products—is not present, the defendant's motion should be granted as to this claim.[21]

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[21] Because of the disposition of this claim on the stated grounds, no consideration need be given to Walters' claims of coercion, lack of justification and injury.

ADVERTISED SPECIALS

Morton's motion for summary judgment as to Walters' claim of retail price fixing also should be granted. Several times during each year Morton advertises certain "specials" under which a particular style of building is sold to the public for a limited time at a reduced price. The advertisements of such discounts state the reduced price and list the names and addresses of Morton's sales offices and independent dealers, including Walters. Morton then offered to sales offices and independent dealers discounts on the wholesale prices charged to them for each "advertised" special sold.

Walters contends that by virtue of the advertisements' inclusion of the retail sales price and coercive tactics by Morton, it had no choice but to sell the buildings at the discounted rate. Walters further claims that because the wholesale price discount received by it was less than the retail price discount given to the consumers, Walters' profit margin was reduced for each "advertised special" sale made.

While a retail price fixing arrangement setting maximum or minimum prices constitutes a per se violation of the Sherman Act,[22] *Arnott* vs. *American Oil Company*, 609 F.2d 873, 885 (9th Cir. 1979), cert. denied, 446 U.S. 918 (1980); *Lehrman* vs. *Gulf Oil Corporation*, 464 F.2d 26, 41 (5th Cir.), cert. denied 409 U.S. 1077 (1972), the mere announcement of a pricing policy and the unilateral re-

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[22] While no express contract existed relative to the "advertised specials", Walters' acquiesence in the set retail price may be seen as constituting a "combination" with Morton for the purposes of the Sherman Act. *Yentsch, supra*, 630 F.2d at 51; *Arnott, supra*, 609 F.2d at 885; *Pearl Brewing Co.* v. *Anheuser-Busch, Inc.*, 389 F.Supp. 945, 950 (S.D. Tex. 1972).

fusal to deal with those who act to the contrary is not violative of the anti-trust laws. *Yentsch* vs. *Texaco, Inc.*, 630 F.2d 46, 51 (2d Cir. 1980). Where, however, a producer or supplier secures adherence to a suggested price through coercion and intimidating actions going beyond a mere refusal to deal, a per se violation exists. *Yentsch, supra*, 630 F.2d at 52; *Lehrman, supra*, 464 F.2d at 37; *Sahm* vs. *V-1 Oil Company*, 402 F.2d 69, 71 (10th Cir. 1968); *Pearl Brewing Co., supra*, 389 F.Supp. 945, 951 (S.D. Tex. 1972).

The evidentiary documents and materials submitted by Walters are insufficient as a matter of law to raise a factual issue relative to Morton's coercion of Walters' acceptance of the discounted retail prices. Of the many affidavits submitted in support of its position, Walters has provided the court with only one general allegation that Morton threatened to terminate Walters if Walters did not follow the advertised prices. Its remaining references to Morton's alleged coercion involve (1) Morton's policy statements and directives relative to the computation of the sales price and discounts; (2) Morton's use of "roving supervisors" to monitor its dealers' general performance; (3) Walters' complaints as to its inability to receive wholesale discounts for buildings not sold at the retail discount;[23] and (4) Morton's response to Walters' complaints of the advertisements' inclusion of a retail price figure, that if Walters objected, Morton would sell in Walters' territory at the discounted price.[24]

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[23] This practice is, of course, proper. See *Butera* v. *Sun Oil Co., Inc.*, 496 F.2d 34 (1st Cir. 1974).

[24] Morton's actions would not be violative of the anti-trust laws as long as Morton did not use coercive tactics to destroy competition. The facts show no evidence that Morton tried to "wipe out" Walters in this regard, particularly since Morton could simply terminate its relationship with Walters upon reasonable notice. See *Neugebauer* v. *A.S. Bell Co.*, 474 F.Supp. 1073 (D.Md. 1979).

The crux of retail price fixing is that it violates the dealer's freedom to independently determine the price levels which he will maintain. *Albrecht* vs. *Herald Co.*, 390 U.S. 145, 152, 88 S.Ct. 869, 191 L.Ed.2d 998 (1968), reh. denied 390 U.S. 1018 (1968); *Pearl Brewing Co., supra*, 389 F.Supp. at 955. The existence of Morton's advertisements, however, and Walters' conclusory allegation that at an unidentified point it complained to Morton and was generally threatened with termination are insufficient to show that Morton conditioned the continuation of Walters' dealership upon its sale of buildings at a discounted retail price during certain periods. This is not a situation of continued intimidation and coercion as occurred in *Sahm, supra, Lehrman, supra, Arnott, supra*, or *Albrecht, supra*.[25]

Jim Walters testified that, even if Walters' name had not been in the ads, its customers still would have looked to Walters for the discounted price. He further testified that Morton offered to delete Walters' name from the ad. There can be no question that Morton could advertise any price it desired for its own sales offices. Thus, the effect was the same whether Walters' name was in the ad or not.

Consumers, after reading the advertisement or contacting a Morton sales office, would have requested that Walters provide them with a price in accordance with that offered by the other sales offices. To be competitive Walters then would have had to sell the building at a reduced rate. Morton's motion should therefore be granted with respect to Walters' claim of retail price fixing.

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[25] Walters' reliance on *Cokeley* v. *Tandy Corp.*, 1973-1 Trade Cases ¶74,342 (N.D. Cal. 1973) is misplaced. *Cokeley* held only that, under its facts, summary judgment was improper.

UNFAIR COMPETITION

Walters contends that Morton intentionally and maliciously "hired away" certain of its employees, in part by disrupting their working relationship with Walters, in order to reduce Walters' competitive capabilities. In support of its position, Walters relies on the affidavit of Bill Walters which alleges that after Morton terminated its relationship with Walters in 1978 (1) Morton contacted certain unnamed former and current employees of Walters; (2) Walters was forced to fire certain employees who did not want to work and were "deliberately" inviting dismissal; and (3) Morton thereafter hired many of these persons.

These allegations are insufficient to support a claim of unfair competition by Walters. From the moment Morton terminated Walters, the two became competitors.[26] Walters' relationship with its employees was terminable as will by either party.[27] Morton thus was "privileged" to contact Walters' current and former employees and to solicit their services as long as its means were not wrongful, its motive was, at least in part, to advance its interests relative to Walters; and its actions did not create or continue a restraint of trade. Restatement (2d) of Torts, Sections 766-768; *Frank* vs. *Kraft,* Case No. 79-C-26 (E.D. Wis. April 1, 1980); *Pure Milk Products Co-Op* vs. *NFO,* 64 Wis.2d 241, 219 N.W.2d 564 (1974).

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[26] There is no allegation that Morton solicited Walters' employees prior to its termination of Walters. See *American Republic Ins. Co.* v. *Union Fidelity Life Ins. Co.,* 470 F.2d 820 (9th Cir. 1972).

[27] Tortious interference in contracts terminable at will is scrutinized less strictly than in contracts for a fixed term, in part because no expectancy of continuing employment exists. See *National Oil Co.* v. *Phillips Petroleum Company,* 265 F.Supp. 320 (W.D. Wis. 1966).

Walters has provided no evidence of any wrongful means employed by Morton except for its conclusory statement that the conduct of certain employees became unacceptable after Morton's termination and that some of these employees were hired by Morton after being fired by Walters. Walters has presented nothing to promote the inference that Morton caused the disruptive behavior of any employees. To the contrary, Morton wrote to Walters requesting recommendations of several employees and specifically asked whether Walters would object to their being hired by Morton. Walters has also produced no facts showing Morton's total and sole motive was to lessen competition, See Restatement (2d) of Torts, Section 768 (d), or that trade was indeed restrained as a result of such contact. Morton thus should be entitled to summary judgment as to this claim.[28]

GOOD FAITH/FAIR DEALING

Walters contends that Morton violated its duty of good faith to Walters primarily by overcharging Walters for materials, limiting and encroaching upon Walters' territories, and controlling Walters' retail prices. Morton's responsibility in this regard is claimed to stem from Wisconsin's implied contractual duty of good faith as well as that of the Uniform Commercial Code.[29] Because neither

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[28] Walters has included in its brief other instances of alleged unfair competition not raised in its complaint. Because the allegations are merely conclusory statements with no evidentiary support, they need not be discussed here.

[29] Section 402.203, Wis. Stats. provides that "[e]very contract or duty within Chapters 401 to 409 imposes an obligation of good faith in its performance or enforcement."

of these doctrines applies to the factual situation presented in this case, Morton's motion for summary judgment as to this claim should be granted.

Morton claims that Walters cannot now rely on the provisions of the Uniform Commercial Code, where it chose not to specifically do so in its amended complaint. Even if Walters had specifically alleged a violation of Section 401.203, Wis. Stats., that section only applies to transactions falling within Chapters 401-409 of the Wisconsin Statutes. Of these, the only chapter within which the instant facts could conceivably fall is Chapter 402, Sales. Section 402.201, Wis. Stats., however, requires the existence of a written contract. Walters claims that Morton initially sent it a letter delineating the parties' relationship. Even if the letter would constitute a contract for the purposes of Chapter 402, Walters has been unable to produce it for the court's inspection.[30]

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[30] Walters has referred the court to *Zapatha* v. *Dairy Mart, Inc.*, 408 N.E.2d 1370 (Mass. 1980), in which the Uniform Commercial Code's good faith standard was applied to the termination of a franchise agreement. As discussed previously, Morton and Walters did not, unlike *Zapatha*, have a franchise relationship as that term is generally used. Further, the court in *Zapatha* found that no violation of good faith definition provided by the Code (Section 402.103(1)(b), Wis. Stats.) existed where the franchisor had acted honestly, although arbitrarily, and the franchisee had provided no evidence of commercial standards of fair dealing. The same is true in the present case.

The other case relied on by Walters, *Corenswet, Inc.* v. *Amana Refrigeration, Inc.*, 594 F.2d 129 (5th Cir. 1979), cert. denied 444 U.S. 938 (1979), chose to follow the common law as it relates to the termination of distributor contracts rather than to apply the Code's good faith provision. The court noted that analysis of the agreement's unconscionability under the Code would be a better approach than questioning the good faith of the parties.

Since the Uniform Commercial Code is inapplicable, the question becomes whether Morton had a contractual duty of good faith under the Wisconsin common law. Contrary to Walters' assertion, Wisconsin has not extended a duty of good faith to all contracts, but has recognized such responsibility only in the context of certain fiduciary relationships.[31] The majority of Wisconsin cases discussing the duty of good faith have done so in the context of the relationship between an insurer and its insured or a third party. See *Loy* vs. *Bunderson*, 107 Wis.2d 400, 428, 320 N.W.2d 175 (1982); *Kranzush* vs. *Badger State Mutual Casualty Co.*, 103 Wis.2d 56, 63, 307 N.W.2d 256 (1981); *Anderson* vs. *Continental Ins. Co.*, 85 Wis.2d 675, 680, 271 N.W.2d 308 (1978); *Alt* vs. *American Family Mutual Ins. Co.*, 71 Wis.2d 340, 348, 237 N.W.2d 706 (1976). The court in these cases recognized that when an insurer acts in bad faith, it breaches the "fiduciary duty" imposed upon it by virtue of the insurance contract. See *Anderson, supra*, 85 Wis.2d at 689; *Alt, supra*, 71 Wis.2d at 348. While some of these cases have referred to the concept of contractual good faith embodied in the Restatement (2d) of Contracts,[32] the court never expressly adopted its provisions as applicable to contracts out of the insurance realm.

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[31] While this conclusion was sought by Morton, it should be noted that Morton's reliance on *Rossow Oil Co.* v. *Heiman*, 72 Wis.2d 696, 242 N.W.2d 176 (1976) for the proposition that the good faith requirement does not exist in non-fiduciary dealership relationships is incorrect. Nowhere in the *Rossow* opinion does the court expressly state that a fiduciary relationship is required for the doctrine to come into play. *Rossow* refused to allow a defense of a lack of good faith to enter into summary eviction proceedings.

[32] Section 231 of the Restatement provides that "[e]very contract imposes upon each party a duty of good faith and fair dealing in its performance and enforcement."

The other Wisconsin case relied on by Walters, *Estate of Chayka,* 47 Wis.2d 102, 176 N.W.2d 561 (1970), while recognizing the existence of a duty of good faith, analyzed such duty in terms of the responsibilities owed by spouses stemming from the creation of joint wills. No other case was found which extended the concept beyond circumstances revealing a fiduciary relationship. Absent a clear expression by the Wisconsin Supreme Court to the contrary, it must be assumed that the courts intended the doctrine to be limited to parties in such fiduciary capacities.

Walters relies on *Photovest, supra* and *Arnott, supra,* for the proposition that the duty of good faith extends to the instant situation. These cases, however, are distinguishable. Prior to *Photovest,* the California courts, unlike Wisconsin, had expressly and repeatedly applied the good faith doctrine to non-insurance cases, including franchise agreements. Further, the parties in *Photovest* had a written contract of a fixed and limited duration, which covered their activities. The letter relied on by Walters as the parties' "contract" has not been presented to the court and, in any event, contained no provisions for termination. In addition, the franchisor in *Photovest* misrepresented its actions to the franchisee. No evidence exists in this case of any material misrepresentations by Morton.

In *Arnott supra,* the court found that a fiduciary relationship existed between the defendant oil company and its service station franchisee. In contrast, no fiduciary relationship exists in this case. The parties were not involved in a typical franchise relationship. In addition, Walters has submitted nothing to suggest that their relationship was the result of unequal information or bargaining power. That Morton possesses sizeable economic power

in the assembled-building market does not imply that it possessed such power over Walters as regards their own business relationship. Walters' own economic power is demonstrated by its ability to quickly draw a profit from the marketing of its own buildings. Since no fiduciary relationship exists, no duty of good faith and fair dealing was imposed upon Morton,[33] and its motion should be granted as to this claim.

PREDATORY SCHEME

Walters contends that, even if Morton's activities do not constitute illegal tying, price, territorial or related restraints, the totality of Morton's actions, including its wholesale price increases,[34] constitutes a predatory scheme to force Walters and the other independent dealers out of business. It is true that practices which are not unlawful in isolation may, when combined with a predatory purpose, constitute an illegal restraint of trade. See *Coleman* vs. *Chrysler Corp.*, 525 F.2d 1338 (3rd Cir. 1975). Further, a scheme to force independent dealers out of business pursuant to a plan of vertical integration may be a violation of Section 1 of the Sherman Act.

An issue of fact appears to exist as to Morton's intent in imposing its restrictions. *Photovest, supra,* 606 F.2d at 726. For a violation of Section 1 of the Sherman Act to occur, however, a contract, combination or conspiracy

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[33] Because of this conclusion the court need not determine if an issue of fact exists as to whether any duty of good faith had been breached by Morton. The materials submitted by Walters, however, do not appear to show any actions taken by Morton which showed any significant lack of fair dealing and adherence to proper standards on the part of Morton.

[34] Walters concedes in its brief that the increasing of wholesale prices in and of itself does not violate the Sherman Act.

must exist. Walters' position that a "combination" arose as a result of Walters' unwilling compliance with Morton's policies is unpersuasive. Facing a similar argument the court in *H. & B. Equipment Co., Inc., supra,* 577 F.2d at 243, held that a party cannot be considered to agree (or comply) with another that it will be driven to "financial ruin." The same rationale appears sound in this case.

Walters also contends that Morton colluded with its materials suppliers, which would not sell directly to Walters. Their involvement, however, is not alleged in the context of a "combination" in a broad predatory sense but only in the context of Walters' tying claim which does not lie because of the absence of two products. Because of the lack of a contract, combination or conspiracy as to the predatory scheme, Morton's motion should be granted as to this claim.

TERRITORIAL RESTRICTIONS

Morton bases this portion of its summary judgment motion on the argument that the entire question of the territorial restrictions must be viewed in light of its policy not to ship building packages to job-sites outside of a dealer's territory. It argues that this policy does not violate the law. It then argues that Walters economically could not and would not do business with a customer outside of its territory, since the added cost of shipping the materials from Walters' office to the job-site was too high. Morton argues that, if the non-shipment policy does not violate the law, it follows that all of its other policies and practices as to territory are irrelevant.

While the foregoing argument would appear to be valid, the underlying assumption is invalid. Morton argues that the non-shipment policy is a mere unilateral refusal to

deal without more and thus is legitimatized under the doctrine of *United States* vs. *Colgate & Co.*, 250 U.S. 300 (1919). It is apparent from the record, however, that the sole purpose of the non-shipment policy was to enforce the territorial restriction on the dealers. Thus the question is whether the territorial restriction can be characterized as a mere refusal to deal without more. That is not possible. It is a vertical non-price restriction subject to analysis under the rule of reason. *Continental T.V.* vs. *G.T.E. Sylvania*, 433 U.S. 36 (1977). Morton does not ask the court to rule as a matter of law upon such rule of reason application to Morton's territorial restrictions.

It should be noted that, in its brief, Walters argues in a footnote that, since Morton uses a dual distribution system, the territorial restrictions amount to horizontal restrictions and thus are *per se* illegal. The better-reasoned decisions have held that a rule of reason analysis is applicable in dual distribution systems. *Krehl* vs. *Baskin-Robbins Ice Cream Co.*, 664 F.2d 1348 (9th Cir. 1982); *Abadir & Co.* vs. *First Mississippi Corp.*, 651 F.2d 422 (5th Cir. 1981).

Thus, Walters is entitled to trial on its claim that Morton violated Section 1 of the Sherman Act by its illegal territorial restrictions. As conceded by Morton, the "contract, combination or conspiracy" requirement of Section 1 of the Sherman Act is met by a dealer's acquiescence in its manufacturer's vertical restriction. *Albrecht* vs. *Herald Co.*, 390 U.S. 145 (1968); *United States* vs. *Parke Davis & Co.*, 362 U.S. 29 (1960); *Lessig* vs. *Tidewater Oil Co.*, 327 F.2d 459, 464 (9th Cir. 1964); *Osborn* vs. *Sinclair Refining Co.*, 324 F.2d 566 (4th Cir. 1963). It is also clear in this case that Walters was not terminated as a dealer by Morton for anything having to do with territorial restrictions.

Walters was terminated, because it was going to sell its own line of building packages in addition to the Morton line. Therefore, the damage issue on the territorial restraints should be limited to those damages allegedly suffered by Walters prior to its termination. Walters apparently will attempt to do this by expert testimony. *See e.g., H. & B. Equipmental Co., Inc.,* vs. *International Harvester,* 577 F.2d 239 (5th Cir. 1978).

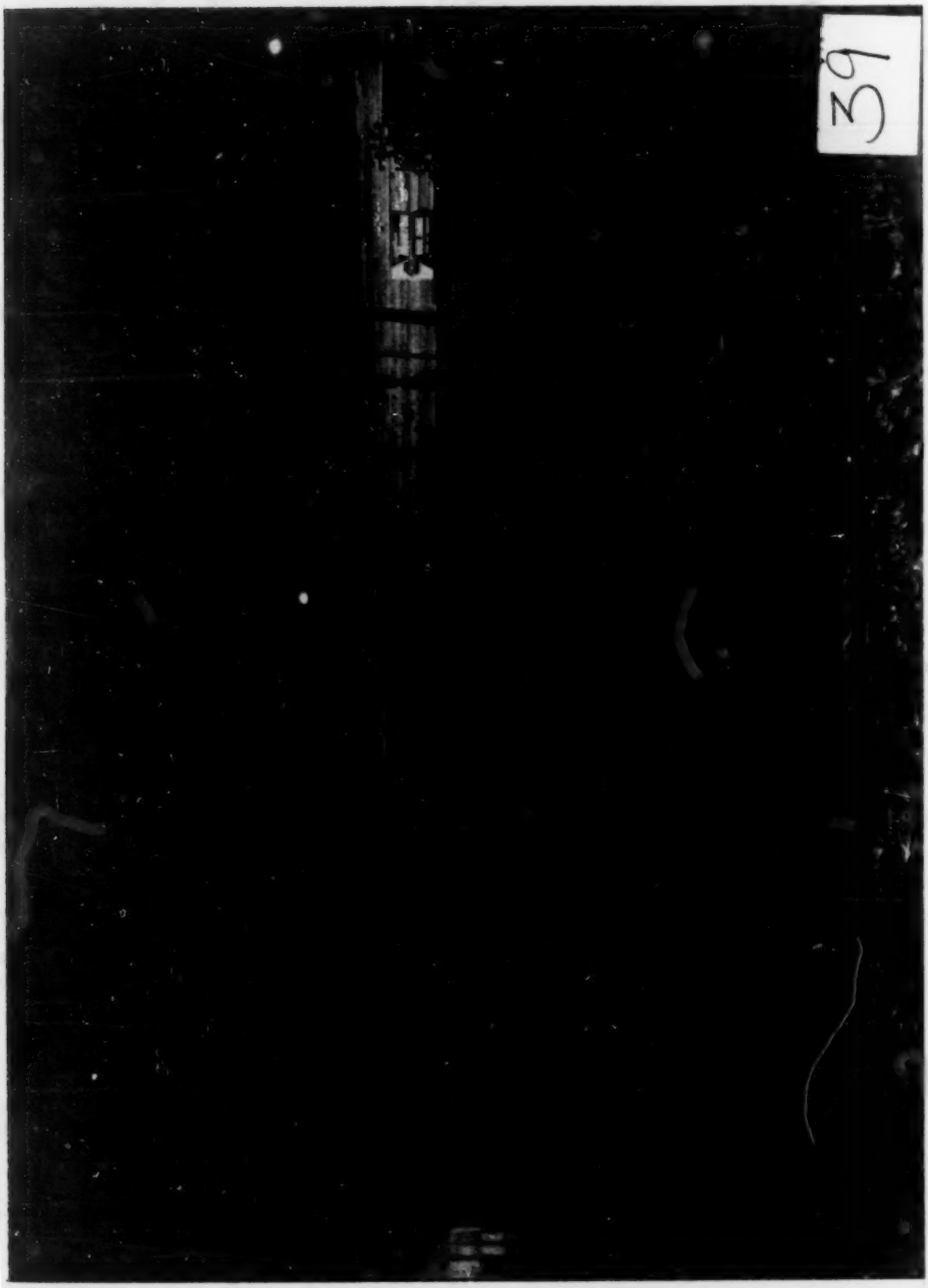
CONCLUSION

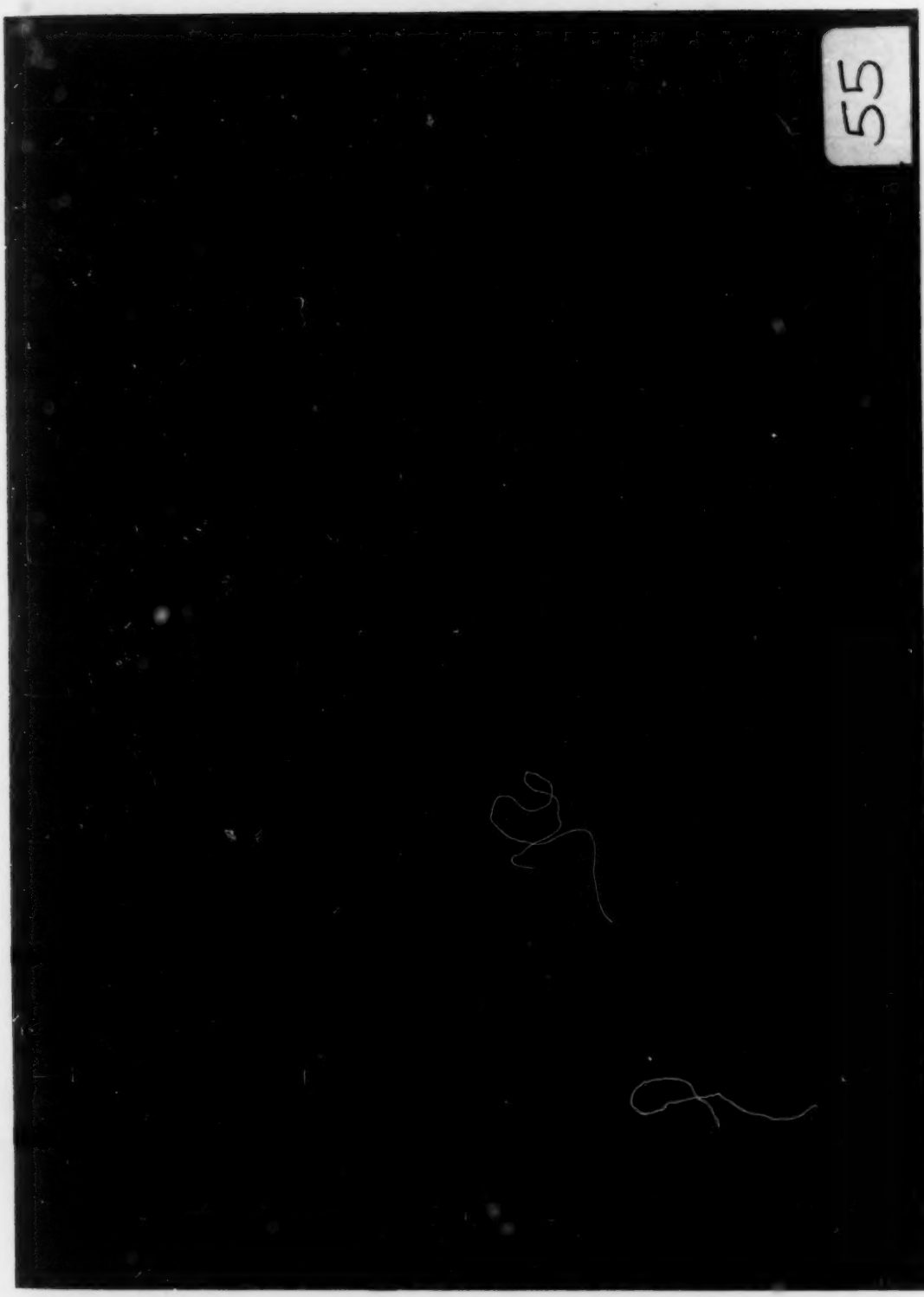
For the foregoing reasons, Morton's motion for summary judgment should be granted as to Walters' second, third, fourth and fifth claims in Walters' amended complaint and as to all portions of the first claim except those portions pertaining to the alleged territorial restrictions. It is recommended that the court enter the order attached to this report.

Dated at Milwaukee, Wisconsin this 29th day of October, 1982.

/s/ Bruce C. O'Neill
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Special Master

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